Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

TYRON LATWAIN HARDAWAY,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

On Petition For Writ Of Certiorari To The Kansas Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

When the state charges rape of a person incapable of consenting because of mental deficiency, which condition was known or reasonably known to the accused, does a court violate the accused's Fourteenth Amendment right to due process and a fair trial when it invokes a rape shield statute to prevent him from offering evidence of prior sexual conduct in support of his theory of defense that (1) the complainant was capable of consenting; and (2) the accused believed the complainant was capable of consenting?

2.

When the state charges rape of a person incapable of consenting because of mental deficiency, which condition was known or reasonably known to the accused, does a court violate the accused's Sixth Amendment right to confrontation by invoking a rape shield statute to prevent him from cross-examining and impeaching the state's witnesses with regard to the complainant's prior sexual conduct when relevant to whether (1) the complainant was capable of consenting; and (2) the accused believed the complainant was capable of consenting?

PARTIES TO THE PROCEEDING

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OPINION BELOW

The unreported decision of the Kansas Court of Appeals affirming Petitioner's conviction is *State v. Hardaway*, No. 80,421 (Kan. Ct. App. December 10, 1999). App. 1.

JURISDICTION

The judgment of the Kansas Court of Appeals was entered on December 10, 1999. App. 1. The Kansas Supreme Court denied review on March 21, 2000. App. 10. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution, Section I, provides in relevant part that " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. A section of the Kansas Rape Statute, K.S.A. 21-3502(a)(1)(C), defines the offense of rape as including "[s]exual intercourse with a person who does not

consent to the sexual intercourse . . . when the victim is incapable of giving consent because of mental deficiency or disease . . . which condition was known by the offender or was reasonably apparent to the offender."

4. The Kansas Rape Shield Statute, K.S.A. 21-3525, provides in relevant part:

(b) Except as provided in subsection (c), in any prosecution to which this section applies, evidence of the complaining witness' previous sexual conduct with any person including the defendant shall not be admissible, and no reference shall be made thereto in the presence of the jury, except under the following conditions: The defendant shall make a written motion to the court to admit evidence or testimony concerning the previous sexual conduct of the complaining witness. The motion must be made at least seven days before the commencement of the trial unless that requirement is waived by the court. The motion shall state the nature of such evidence or testimony and its relevancy and shall be accompanied by an affidavit in which an offer of proof of the previous sexual conduct of the complaining witness is stated. The motion, affidavits and any supporting or responding documents of the motion shall not be made available for examination without a written order of the court except that such motion, affidavits and supporting and responding documents or testimony when requested shall be made available to the defendant or the defendant's counsel and to the prosecutor. The defendant, defendant's counsel and prosecutor shall be prohibited from disclosing any matters relating to the motion, affidavits and any supporting or responding documents of the motion. The court shall conduct a hearing on the motion in camera. At the conclusion of the hearing, if the court finds that

evidence proposed to be offered by the defendant regarding the previous sexual conduct of the complaining witness is relevant and is not otherwise inadmissible as evidence, the court may make an order stating what evidence may be introduced by the defendant and the nature of the questions to be permitted. The defendant may then offer evidence and question witnesses in accordance with the order of the court.

(c) . . . the prosecuting attorney may introduce evidence concerning any previous sexual conduct of the complaining witness, and the complaining witness may testify as to any such previous sexual conduct. If such evidence or testimony is introduced, the defendant may cross-examine the witness who gives such testimony and offer relevant evidence limited specifically to the rebuttal of such evidence or testimony introduced by the prosecutor or given by the complaining witness.

STATEMENT OF THE CASE

In this case the overprotective guardians of "RC," a high-functioning, mildly mentally retarded woman, contrived to minimize her sexual maturity by condemning Petitioner Hardaway for an act RC initiated. This case presents a perfect example of how unconstitutional limitations on cross-examination and the presentation of defense evidence can result in an unjust conviction.

In the Fall of 1996, Petitioner Tyron Latwain Hardaway, a 24-year-old African-American college student with no prior convictions, was an employee of Disability Supports, a Kansas agency providing direct care to disabled

adults. R. Vol. I at 144; Vol. XV at 22; Vol. XIV at 64.[1] Mr. Hardaway was assigned to "staff" one Aimee Michaud, a disabled adult living in a private apartment with RC, a white woman and the complainant in this case. R. Vol. XII at 173; Vol. XIV at 65-66. Mr. Hardaway's duties included assisting Ms. Michaud with daily tasks and keeping a log-book of her activities and moods. R. Vol. XIV at 44, 53, 56-57. Mr. Hardaway had previously provided care for both Ms. Michaud and RC, under the auspices of an agency called Multi Community Diversified Services ("MCDS"). R. Vol. XII at 171; Vol. XIV at 43-44, 51. However, at the time of the events underlying the charge in this case, Mr. Hardaway, via Disability Supports, was responsible only for assisting Ms. Michaud, while a Denise Bobadilla, via MCDS, was RC's direct care giver. R. Vol. XII at 171-72; Vol. XIV at 64-65. RC was a "high functioning," "mildly retarded" 23-year-old who, with varying levels of supervision, lived independently (i.e., without need for around-the-clock monitoring), held a job, had a bank account, went out on social occasions, and took care of her own chores and meals. R. Vol. XII at 61, 95, 127, 162, 164; Vol. XIV at 4, 196. RC's care givers had educated her about sexual matters, allowed her to have a Norplant birth control device implanted, and

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[1] In setting forth the background facts of this case, counsel has relied on and cited to the Record on Appeal currently in possession of the Kansas District Court for McPherson County, but not yet transmitted to this Court or included in the Appendix hereto. U.S. Sup. Ct. R. 12(7) (allowing citation or quotation "from the record, even if it has not been transmitted to this Court"). When referring to those portions of the record included in the Appendix hereto, counsel has cited to both the Kansas Record on Appeal as well as to the Appendix.

knew about, and apparently consented to, her sexual activities with her then-boyfriend. R. Vol. VII at 41; Vol. XII at 197-98. Neither the State of Kansas nor anyone else has ever contended that RC was incapable of consenting to this sexual activity with her boyfriend.

RC admitted at trial that she was a person who "tell[s] stories that's [sic] not true," and the care givers who had worked with her agreed that RC "did tell a lot of fibs;" she "had a tendency to exaggerate or to make things up;" "if she were talking about something that were not the truth, she would expand on it for a great length of time, if she had the audience;" and when confronted with rules violations "she would get very defensive, she would cry hysterically, try to blame other people for her actions. She would lie." R. Vol. XII at 121, 134, 147; Vol. XIII at 49; Vol. XIV at 6, 21-22. RC and Ms. Michaud were known to bicker and express jealousy over Mr. Hardaway, and RC's primary care giver, Denise Bobadilla, acknowledged that RC had a "crush" on Mr. Hardaway. R. Vol. XIII at 51-52.

On the evening in question, Mr. Hardaway was the only staff person in RC's and Ms. Michaud's apartment. R. Vol. XIV at 68-71. RC had unsuccessfully been trying to contact her boyfriend by telephone, and when he was not available to take her calls RC began despairing that "nobody loved [her]." R. Vol. XII at 88. In an effort to comfort her, Mr. Hardaway told RC that he cared about her, which "kinda sorta" made RC feel better. *Id.* at 89. Mr. Hardaway offered to help RC get ready for bed, since her staff person was not there. R. Vol. XIV at 75. He walked her to her room, at which point she began hugging and fondling him, contact which quickly led to

intercourse. *Id.* The situation took Mr. Hardaway by such surprise that he "wasn't reacting as fast as [he] probably could have if it wouldn't have been something serious." *Id.* at 87. Mr. Hardaway later recognized that it was a "bad situation"; nonetheless, there was nothing he knew about RC that led him to believe she could not consent to having sex. *Id.* at 87-88. His primary concern was that the encounter, if exposed, would be viewed negatively because he was black and she was white, and he feared that any false version she might tell of the event would be believed in the small, predominantly white town of McPherson, notwithstanding his own knowledge of what had really happened. *Id.* at 79-80.

Mr. Hardaway's fears became reality when RC told her care giver about the incident, claiming Mr. Hardaway "had sex with me and I didn't want to." R. Vol. XII at 188. Despite her care givers' knowledge of RC's tendency to lie and blame others for her actions, and despite her care givers' knowledge and accommodation of RC's sexual activities with her boyfriend, RC's care givers swallowed whole cloth her accusations against Mr. Hardaway, and presented her to law enforcement as a vulnerable victim who was incapable of initiating or even agreeing to sex. R. Vol. VII at 41. The State eventually charged Mr. Hardaway with rape defined as sexual intercourse "when the victim was incapable of giving consent because of mental deficiency or disease, which condition was known by the offender or reasonably apparent to said offender, contrary to K.S.A. 21-3502(a)(1)(C)." Vol. I at 32. At trial, the state relied primarily on a psychological expert who testified that, in large part due to her IQ level, RC was

incapable of consenting to sex, a conclusion reached by examining RC's abilities in the following three areas:

> Knowledge . . . of the nature of the activity and its consequences including physical consequences, moral, ethical, psychological and emotional consequences.
>
> * * *
>
> . . . [A]bility . . . to realize the benefits and risks of the activity and a demonstrated ability to rationally process the knowledge or information by applying it to personal standards of living or in other ways that reflect a thought process. For sexual activity this includes the awareness of the social, moral or ethical nature of sexual relations.
>
> * * *
>
> Voluntariness . . . [i.e., a] decision free of any unreasonable coercion to choose to – to choose to engage or refrain from sexual activity.

R. Vol. XIII at 69, 71, 80, 102. A defense expert reached the opposite conclusion, testifying that as a result of his testing and interview with RC, he had formed the opinion that she was able to "make a knowing decision regarding sexual intercourse." *Id.* at 191-92.

Prior to trial, at the preliminary hearing, counsel for Mr. Hardaway attempted to challenge the state's contention that RC was unable to consent to sex simply because of her mildly retarded IQ level, by proffering evidence "that she had been seen or treated by an OB/GYN, that she had the Norplant installed. That the staff people knew and consented to her having sex with her boyfriend, and that at the time of this incident she was in fact

sexually active." R. Vol. VII at 41; App. 11-12. The district court excluded the evidence "pending further hearing on that." *Id.*

Defense counsel's unsuccessful repeated offers of this and similar evidence – made at every relevant stage of this case with repeated implied references to Mr. Hardaway's federal constitutional rights – were as follows:

Counsel first filed a motion pursuant to the Kansas Rape Shield Statute, K.S.A. 21-3525, seeking admission at trial of "evidence of the alleged victim's prior sexual conduct," and invoking federal constitutional values by identifying the evidence as "necessary in order to provide the Defendant with a fair trial." R. Vol. I at 63; App. 13. At the hearing on the motion, defense counsel sought to admit evidence of RC's prior sexual activities (1) to show the basis for the defense psychology expert's conclusion that RC was capable of consenting to sex; (2) to impeach RC if she denied that she ever had any prior sexual experience; and (3) to demonstrate Mr. Hardaway's reasonable belief that RC was capable of consenting to sex. R. Vol. X at 7-9, 37-40; App. 15-20. The district court concluded that RC's prior sexual conduct "does not seem probative" on the issue of her capacity to consent, and, ignoring the other bases offered for the evidence, held that it would be excluded. R. Vol. I at 85-86; App. 6-9.

Prior to trial, defense counsel again stressed that admission of RC's prior sexual activity was necessary to explain the basis for the defense expert's conclusions, and additionally to challenge the state's expert's conclusions. R. Vol. XI at 23-25; App. 22-25. Counsel explained further that it would be necessary to cross-examine RC about her

prior sexual experiences because she had falsely informed the state's expert that she had never had sex before the incident with Mr. Hardaway. *Id.* at 25; App. 24-25. Finally, counsel argued that the evidence was relevant in support of Mr. Hardaway's theory of defense that, given all he knew about RC's history, he believed she was capable of consenting to sex. *Id.* at 27-28; App. 26-27. Specifically, counsel proffered evidence that the MCDS records, to which the state claimed Mr. Hardaway had ready access during his tenure there, showed:

> . . . that MCDS had a specific plan regarding this woman in her having sex. That – that sex was readily permitted. That she was given quality time with another one of their clients. The fact was that they were actually discussing a marriage situation between the two of them and trying to determine whether that was going to be a possibility.

Id. Counsel further proffered evidence that "the woman was – was talking about sex, was having sex, was asking questions about marriage and having a family," and argued in constitutional terms that excluding such evidence relevant to the question of RC's understanding of the consequences of sex would "prevent[ ] my client from effective confrontation of the witnesses." R. Vol. XII at 23; App. 33. The district court – while recognizing the impeachment value of at least some of the proffered evidence – held essentially that the Rape Shield Statute trumped the defendant's rights to impeachment, declaring:

> . . . even though it might be impeaching, it throws us over into the Rape Shield area that I think is going – that it implies specific instances

> of sexual conduct and – and it's a back door way around the Rape Shield Statute. So I just don't know what you are doing, and until I feel comfortable with what you are doing I'm not going to say, Yeah, you can do it or, No, you can't do it.

R. Vol. XII at 24-25; App. 34.

At trial, defense counsel continued to assert Mr. Hardaway's rights to confrontation, to present a defense, and to a fair trial, asking after RC's testimony to present evidence regarding "the area of her knowledge regarding sex and . . . regarding the private time that was allowed as a, as the program facilitator and the arrangements that were made by the company for [RC] to engage in sexual activity," and "that this information was known to all of those who worked with her." R. Vol. XII at 156-57; App. 36-38. The district court denied the request. *Id.* Defense counsel again attempted to present the evidence by cross-examination of Denise Bobadilla, who testified that all of the information in RC's files was available to Mr. Hardaway. R. Vol. XII at 195. Counsel explained that:

> . . . the file is replete with a situation where this woman was – was routinely going through and getting information regarding birth control, regarding the act of sex itself, about marriage, about disease. These were all relevant informations that would lead one to conclude that a person that [sic] has those capabilities. . . . And . . . contained in their file is information which would indicate that she had knowledge about sexual intercourse, that intercourse leads to pregnancy. She knows slang words for sexual intercourse. She is able to quantify or verbalize

> about two kinds of love. She is able to give correct information when dating.
>
> That is all information, obviously that is available, apparently through this witness, that is known by my client, that forms the basis at some point, as I have indicated earlier, to attacking the credibility of the expert who comes in and propounded the opinion, she can't consent to sex because she didn't have cognitive reasoning when it comes to sex.
>
> And to say to the jury that all this information is there and then not allow my client at some point to bring out either through cross-examination of witnesses or through his own testimony, that what information truly is available, and what he knows about this gal does not present – does not give my client [sic] to present a fair defense.

R. Vol. XII at 197-98; App. 40-41. The court continued to hold that "I am not going to permit discussion about actual sexual conduct, physical sexual conduct. I'm not going to permit it. I think that is a violation of the Rape Shield Act," and specifically forbade defense counsel from asking questions about RC's interest in "more information about sex so that she can have sex and it doesn't hurt" or about the "actual installation of birth control devices." R. Vol. XIII at 11, 15, 18; App. 45, 48, 51.

Again, in an attempt to provide a proper foundation for the defense expert's testimony that RC was capable of consenting to sex, defense counsel proffered "that the doctor could testify regarding those sexual events as relayed to him by [RC] during the course of his examination." R. Vol. XIII at 178; App. 52. The court overruled the

request to present the testimony, and sustained the state's objection when the expert inadvertently made reference to RC's use of birth control. *Id.*; R. Vol. XIII at 197; App. 53-54.

Finally, during Mr. Hardaway's testimony, defense counsel requested permission to "ask him questions specifically about [RC] and the fact that she was engaging in sexual activity and how that imparts [sic] on his knowledge of her ability to consent to having sex." R. Vol. XIV at 40; App. 55-56. The court overruled the request. *Id.*

After trial, counsel for Mr. Hardaway moved for a new trial, asserting by use of federal constitutional terminology that "the failure to admit evidence of the victim's prior sexual conduct, including the fact that she was sexually active with the approval of her guardian, denied the Defendant a fair trial." R. Vol. I at 138; App. 57. At the hearing on the motion, counsel again invoked Mr. Hardaway's federal constitutional rights by arguing that the court's exclusion of the proffered evidence "prevented [defense counsel] from effectively cross examining the victim" and from "impeach[ing]" the state's expert's opinion that RC could not consent to sex. R. Vol. XV at 8-12; App. 59-64. The court denied the ruling, noting that defense counsel had "made an excellent record for – for review" of the issues, but concluding that even though "[i]t certainly wasn't a perfect trial . . . I think it was a fair trial." R. Vol. XV at 18; App. 64-66.

On appeal to the Kansas Court of Appeals, counsel for Mr. Hardaway argued that the trial court's reliance on the Rape Shield Statute to exclude the proffered evidence

of RC's prior sexual activity "greatly impact[ed] the presentation of the defendant's case and denie[d] him a fair trial," and further "denie[d] the opportunity to properly cross examine the state's witnesses." App. 68-77. The Court of Appeals gave no weight either to the defendant's right to present his theory of defense or to his right to confrontation, and merely concluded that the Rape Shield Statute prohibited introduction of the proffered evidence because "there is no similarity between alleged sexual activities with a boyfriend and the victim's mental capacity to resist or consent to sexual advances of an authority figure." App. 2-3. The Court thus construed the statute narrowly *against* the defendant's right to present evidence, and did so without reference to any federal constitutional guidelines or manner of weighing the defendant's rights against the interests of the Kansas Rape Shield Statute. Counsel sought review in the Kansas Supreme Court, once again invoking federal constitutional rights by implication in arguing that the district court's application of the Rape Shield Statute to limit his presentation of evidence and impeachment of the state's witnesses "prevented the defendant from receiving a fair trial." App. 80-81. The Kansas Supreme Court denied review. App. 10.

ARGUMENT FOR ALLOWANCE OF THE WRIT

This petition poses the question whether, when the state charges rape of a person incapable of consenting because of mental deficiency, which condition was known or reasonably known to the accused, a court violates the accused's Sixth and Fourteenth Amendment rights to

confrontation, due process, and a fair trial when it invokes a rape shield statute to prevent him from offering evidence of prior sexual conduct to impeach the state's witnesses and/or otherwise in support of his theory of defense that (1) the complainant was capable of consenting; and (2) the accused believed the complainant was capable of consenting.

It is basic criminal law that "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process" and "among the minimum essentials of a fair trial." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

This Court has cautioned that a rape shield statute might implicate both of these concerns, since "[t]o the extent that it operates to prevent a criminal defendant from presenting relevant evidence, the defendant's ability to confront adverse witnesses and present a defense is diminished." *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991). It appears that the only time this Court has reviewed the application of a rape shield statute was eight years ago, in *Lucas*. *Id*. There, this Court was concerned only with the constitutional implications of *procedural requirements* imposed on defendants by rape shield statutes. This Court has never before reviewed a case in which a rape shield statute was interpreted to place *substantive* limitations on a defendant's ability to present evidence relevant to a complainant's mental capacity to consent or the defendant's knowledge thereof in a case such as Mr. Hardaway's. The decision by

the Kansas Court of Appeals involved an important question of federal constitutional rights that should be settled by this Court.

Nearly every state has a statute similar to the Kansas provision relied on in this case, defining rape as including intercourse with a person unable to consent due to a mental deficiency or incapacity. *See* Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. Ill. L. Rev. 315, Appendix, Table B (1997) (listing state statutes with terms or categories encompassing mentally retarded victims). Many of these statutes, including the Kansas rape statute, obligate the state to show both (1) that the complainant was, in fact, incapable of consenting to intercourse, and (2) that the defendant knew or had reason to know of the complainant's incompetency. *Id.* at Appendix, Table C (listing elements of statutes by state). These statutes reflect laudable goals of protecting people vulnerable to sexual exploitation due to mental illness and other disabilities. The challenge in enforcing these statutes is to do so in such a way that recognizes the rights and abilities of retarded adults to enter into contracts, marry, have sex, and have children. Advocates for mentally retarded people caution that these kinds of rape statutes "constitute legally enforced celibacy for mentally retarded persons and overzealous moralizing about who can and cannot engage in sexual relations and why." *Id* at 343. This Court has recognized in other contexts that "mentally retarded persons are individuals whose abilities and experience can vary greatly." *Penry v. Lynaugh*, 492 U.S. 302, 340, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (refusing to hold that Eighth Amendment categorically prohibits execution of retarded people simply because of

their "mental age," since "reliance on mental age to measure the capabilities of a retarded person for purposes of the Eighth Amendment could have a disempowering effect if applied in other areas of the law . . . [i.e.,] a mildly mentally retarded person could be denied the opportunity to enter into contracts or to marry by virtue of the fact that he had a 'mental age' of a young child"). A failure to give due regard to the abilities and rights of retarded adults when applying rape shield statutes in the context of these cases can result not only in the exclusion of relevant evidence to the defendant, but also in the furtherance of assumptions underlying the disempowerment of retarded adults generally.

Given the prevalence of rape statutes such as that relied on in this case, the questions raised in this petition are not unique to Mr. Hardaway's case, but rather are certain to arise again. This Court's guidance in balancing defendants' rights to cross-examine witnesses and present evidence, against the legitimate interests of state rape shield statutes, would greatly assist the state courts in this sensitive area. While there exists an abundance of both state and federal cases conducting this balancing in cases where rape by force or fear was charged and consent was offered as a defense, few cases exist to provide guidance when the rape charged requires a showing of both inability to consent due to mental defect, and the defendant's knowledge of such defect. The jurists who have attempted to address questions similar to the ones raised in Mr. Hardaway's petition have differed in their results. *See, e.g., State v. Scherzer*, 694 A.2d 196, 220 (N.J.

Super. A.D. 1997) (trial court correctly allowed presentation of evidence of allegedly mentally defective complainant's prior sexual conduct "from which the jury could infer that she might have consented to the acts . . . and that defendants thought she understood sex and her right to say no"; court properly invoked state rape shield statute to refuse admission of "every sexual incident" in complainant's past, "when such evidence might focus attention on her mores and prejudice the jury against her, thus deflecting their consideration from defendant's actions"); *State v. Anderson*, 902 P.2d 1206 (Or. App. 1995) (finding no error where trial court invoked state rape shield statute to exclude evidence of retarded complainant's sexual reputation offered to show defendant's belief that complainant had capacity to consent); *State v. Summers*, 853 P.2d 953, 959 (Wash. App. Div. 1 1993) (finding no error where trial court excluded evidence of prior sexual conduct under state rape shield statute, because "evidence of past sexual encounters does not necessarily show understanding of the nature and, even more clearly, the consequences of sexual intercourse, such as pregnancy or disease").

One of the only detailed analyses of the issues presented in this petition can be found in *State v. Cuni*, 733 A.2d 414 (N.J. 1999), in which the New Jersey Supreme Court considered the admission of evidence similar to that proffered in Mr. Hardaway's case. Cuni was charged with sexually assaulting a "mentally defective person," and at trial defense counsel sought to cross-examine the state's expert witness about what the complainant had told him regarding her prior sexual conduct. 733 A.2d at

419. The expert testified that he had considered the complainant's past in order to determine "what she knew about sexuality and what she knew about intercourse and how she experienced those behaviors before." *Id.* at 419-20. Defense counsel requested permission to inquire about the prior conduct in order to challenge the basis for the expert's conclusion. The trial court prohibited the inquiry because the defendant had given no prior notice of intent to admit prior sexual history, as required by the New Jersey rape shield statute. Cuni was convicted, and argued on appeal that the trial court's exclusion of the evidence was error.

The reviewing Justices reached different conclusions. The majority held that the trial court was justified in barring the evidence, holding broadly that "past consensual sexual experiences . . . are not sufficiently probative to demonstrate the capacity to consent." *Id.* at 424. Additionally, the majority held that "even if . . . a defendant is aware of the previous sexual behavior of the victim with others, such evidence is irrelevant because the defendant's generalized belief that the victim could consent to sexual relations is immaterial." *Id.* at 425.

In dissent, Justice Stein, joined by New Jersey Chief Justice Poritz and Justice Coleman, argued that the district court's ruling "prevented defense counsel from adequately cross-examining the State's psychiatrist and thereby deprived defendant of his constitutional right of confrontation" under both the New Jersey and the United States Constitutions. *Id.* at 428 (Stein, J., dissenting). The dissent emphasized the distinction between forced rape cases involving a consent defense, and cases involving a charge that the victim was simply *unable* to consent,

noting that protections of the rape shield statute "were designed to shield victims from cross-examination about prior sexual experiences designed to show *inclination* to consent – not capacity to consent." *Id.* at 430 (emphasis in original). Noting "that an expert ordinarily is subject to cross-examination concerning the facts underlying his opinion is incontrovertible," the dissent strongly disapproved the result in the case:

> On that issue most critical to a determination of defendant's guilt or innocence of sexual assault – the victim's capacity to consent – cross-examination of the State's sole expert witness testifying on that issue could not constitutionally be restricted unless the interests protected by the Rape Shield law were at risk. In fact, those interests were implicated only remotely by the proposed cross-examination. The potential probative value of the cross-examination, given the sharply contradicting evidence concerning the victim's capacity to consent, overshadowed any possible prejudicial effect. The vital interests underlying the Rape Shield Law are subverted if they are misapplied and misused to deny defendants a full and fair trial.

Id. at 432.

The differing opinions in *Cuni*, as well as in the other cases cited above, demonstrate the need for some guiding standards in this area. Admittedly, the relevance of evidence of prior sexual activity in a particular case can only be decided on a case-by-case basis. However, some guiding standards are needed for determining relevance and

weighing the defendant's right to present relevant evidence against the legitimate goals of state rape shield statutes. The Kansas courts, for instance, have interpreted the Kansas Rape Shield Statute as stating a presumption that evidence of prior sexual activity is irrelevant. *See In re Nichols*, 580 P.2d 1370 (Kan. Ct. App. 1978) (declaring that Kansas Rape Shield Statute "serves to focus both judges' and attorneys' attention upon the fact that the victim's prior sexual activity is not generally relevant, reminding them that a victim's lack of chastity has no bearing whatsoever on her truthfulness and generally has no bearing on the important issue of consent"). This presumption gives inadequate weight to the defendant's constitutional rights to confrontation, due process, and a fair trial, as the decision in Mr. Hardaway's case aptly illustrates.

In conclusion, the issues presented in this petition involve important questions of a federal constitutional nature that have generated conflicting opinions by state court jurists, and that should be settled by this Court. The absence of guidance in this area resulted in an opinion by the Kansas Court of Appeals that gave no consideration to Mr. Hardaway's Sixth and Fourteenth Amendment rights to confrontation, due process, and a fair trial. For these reasons, counsel respectfully submits that review in this case is appropriate and necessary, not only to correct the constitutional flaws in Mr. Hardaway's conviction, but to prevent injustice in future cases.

WHEREFORE, Petitioner Hardaway respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari and allow him to submit a Brief on the Merits of his case.

Respectfully submitted by:

DANIEL E. MONNAT
MONNAT & SPURRIER, CHARTERED
221 South Broadway, Suite 512
Wichita, Kansas 67202
(316) 264-2800

Counsel for Petitioner

NOT DESIGNATED FOR PUBLICATION

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

No. 80,421

STATE OF KANSAS,

Appellee,

v.

TYRON LATWAIN HARDAWAY,

Appellant.

MEMORANDUM OPINION

Appeal from McPherson district court; RICHARD B. WALKER, judge. Opinion filed December 10, 1999. Affirmed.

Roger D. Struble, of Blackwell, Blackwell & Struble, Chtd., of Salina, for appellant.

Ty Kaufman, county attorney, and *Carla J. Stovall*, attorney general, for appellee.

Before JUSTICE ALLEGRUCCI, presiding, STEVE LEBEN, District Judge, assigned, and NELSON E. TOBUREN, District Judge, assigned.

Per Curiam: The defendant, Tyron Hardaway, appeals his conviction of rape, K.S.A. 1998 Supp. 21-3502(a)(1)(C), when the victim, R.C., was incapable of giving consent because of mental deficiency, which condition was known by the defendant or was reasonably apparent to the defendant.

R.C. was mentally impaired, received assisted living supervision, and defendant had been a part of R.C.'s

support staff. Except as otherwise necessary in the opinion, additional underlying facts need not be repeated here.

Defendant argues the trial court abused its discretion by refusing to admit evidence of R.C.'s alleged prior sexual activity with her boyfriend or others under K.S.A. 21-3525, the rape shield statute. He maintains the exclusion of this evidence unfairly prejudiced his defense, that his knowledge of R.C.'s sexual activity negated the element of knowing the victim was mentally incapable of consent or that this was reasonably apparent to him, and to show she was capable of giving consent. Alternatively, he argues that the State's witness who testified on the contents of R.C.'s case file opened the door to information regarding R.C.'s sexual conduct.

> "The rape shield statute, K.S.A. 1992 Supp. 21-3525, allows evidence of an alleged rape victim's prior sexual conduct if, after an in camera hearing, the court finds the evidence relevant to any fact at issue, such as the identify of the rapist, the consent of the victim, and whether or not the defendant actually had intercourse with the victim. Decisions regarding the relevancy of evidence rest within the sound discretion of the trial court, which should not be set aside absent a showing of abuse of discretion." *State v. Lavery*, 19 Kan. App. 2d 673, Syl. ¶ 2, 877 P.2d 443, *rev. denied* 253 Kan. 862 (1993).

Similarities between the alleged sexual offense and prior sexual experience are a consideration in the decision to admit evidence of sexual activity. 19 Kan. App. 2d 673, Syl. ¶ 3.

Under the facts of this case, there is no similarity between alleged sexual activities with a boyfriend and the victim's mental capacity to resist or consent to sexual advances of an authority figure. K.S.A. 21-3525(c), which allows cross-examination of any sexual conduct whether introduced by the State or given by the victim, was not triggered by introduction of the victim's case file. The trial court did not abuse its discretion by denying the admission of this evidence under the rape shield statute.

Next, defendant argues the State's expert, Dr. Pearce, was improperly qualified as an expert and that the trial court erred in allowing her to give her opinion on R.C.'s mental capacity to consent. Defendant suggests the jury should have synthesized the doctor's testing and interviewing information and ultimately decided whether the victim could consent.

> " 'It is within the trial court's discretion to determine the qualifications of an expert witness and the admissibility of the testimony. *State v. McClain*, 216 Kan. 602, 606, 533 P.2d 1277 (1975). A trial court's determination that a witness is qualified to testify as an expert will not be reversed on appeal absent a showing of an abuse of discretion. *State v. Colwell*, 246 Kan. 382, Syl. ¶ 7, 790 P.2d 430 (1990).' " *State v. Willis*, 256 Kan. 837, 839, 888 P.2d 839 (1995).

"Expert testimony in the form of an opinion is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of fact. K.S.A. 60-456(d)." *State v. Smallwood*, 264 Kan. 69, 81, 955 P.2d 1209 (1998).

We have reviewed Dr. Pearce's qualifications and find no abuse of discretion. The expert based her opinion

testimony on interpretation of technical facts which was not within the normal experience of the lay jurors. The jury was free to accept or reject Dr. Pearce's opinion as well as the opinion expressed by the defendant's expert.

Finally, defendant argues the trial court erred in failing to grant his motion for judgment of acquittal and the evidence was insufficient to sustain the verdict. "In ruling on a motion for judgment of acquittal, if a trial judge concludes from the evidence that a reasonable mind might fairly decide a defendant is guilty beyond a reasonable doubt, the motion must be denied and the case must go to the jury." *State v. Schlein*, 253 Kan. 205, 207, 854 P.2d 296 (1993).

> " 'When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.' " *State v. Claiborne*, 262 Kan. 416, 425, 940 P.2d 27 (1997).

Although the experts differed on the victim's ability to consent, defendant argues the State presented an overbroad view of consent. The victim had knowledge of sex and its consequences and testified that she had said, "No." Defendant suggests that under the facts it was apparent the victim knew what was occurring and had the ability to consent to intercourse. Defendant argues the jury could not have concluded beyond a reasonable doubt that he knew or should have known of any inability to consent.

Under the facts of this case, the concept of consent goes beyond the victim's ability to say "no" and her knowledge of sex. Reasonable minds could decide that the victim was incapable of giving consent because of mental deficiency and that this condition was known or reasonably apparent to the defendant.

Affirmed.

RICHARD B. WALKER

District Court Judge
Harvey County Courthouse
P.O. Box 665
Newton, Kansas 67114

JUDGES OF the NINTH JUDICIAL DISTRICT
Harvey and McPherson Counties
ADMINISTRATIVE JUDGE
CARL B. ANDERSON, JR.

DISTRICT JUDGES
THEODORE B. ICE, Division I
RICHARD B. WALKER, Division II

June 10, 1997

Mr. Ty Kaufman
McPherson County Attorney
P.O. Box 1302
McPherson, KS 67460-1302

Mr. Roger Struble
BLACKWELL, BLACKWELL & STRUBLE
301 N. 9th
Salina, KS 67402-0795

Re: State of Kansas vs. Tyron Latwain Hardaway
McPherson County District Court Case No.: 96-CR-4903

(Filed Jun. 11, 1997)

Dear Counsel:

The Court has now had an opportunity to consider all matters at issue in connection with the motion of the defendant to permit presentation of evidence of the alleged victim's prior sexual conduct under K.S.A. 21-3525. Prior to ruling, I have considered the arguments

of the parties, and I have reviewed the preliminary hearing transcript in the case.

The State's theory of the case is that the alleged victim was raped because she did not have the mental ability to give consent at the time the act was committed. Both sides have conducted mental examinations of the alleged victim, and the court is aware that will be a primary issue in the case.

However, the Court is also advised by the defense that it wishes to present testimony both pertaining to the activities on the day the crime was allegedly committed, as well as prior sexual activity between the alleged victim and her boyfriend.

The test the Court must apply in the case such as this under K.S.A. 21-3525 is one of general relevancy. This is normally not an extremely high burden of proof. As noted in *State vs. Bressman*, 236 Kan. 296, 689 P.2d 901 (1984) "The rape shield statute [citation omitted] allows evidence of an alleged rape victim's prior sexual conduct, if it is proved relevant to any fact at issue, such as the identify of the rapist, the consent of the victim, and whether or not the defendant actually had intercourse with her."

The admission of any evidence of prior sexual conduct is obviously potentially damaging to the State's case. However, if it has some probative value or helps the jury understand the general nature of the case, the prejudicial value may be outweighed by the probative value.

In this case, the Court believes that the jury should be entitled to hear the full scope of events which occurred

on the day the crime was alleged to have been committed. To this extent, I believe that any conversation between the defendant and the alleged victim concerning why she was distraught and the immediate circumstances which led up to the alleged sexual activity between the defendant and the victim would be admissible, as part of res gestae of the crime. As such, I believe it serves an important function it letting the jury see the full scope of activities on the day of the crime and as such has probative value.

However, the Court feels differently with respect to the evidence of prior sexual activity with other persons, or on other occasions, on the part of the victim, including testimony concerning implanting of any birth control devices. I believe any testimony such as that runs into dangerous ground as to whether any prior consents were obtained, whether criminal activity was engaged by other individuals who may have had sexual conduct with the alleged victim, and medical reasons for any birth control devices. The sole issue, it seems to the Court, should be whether or not consent was properly able to be given to Mr. Hardaway on the date in question. Prior sexual conduct of the alleged victim does not seem probative on that issue, and therefore will not be admitted by the Court.

For the above reasons, the request of the defendant is granted in part with respect to the specific activities and comments on the day of the alleged rape, but is denied with respect to any other evidence which the defense may wish to produce.

The Court would advise the parties that it intends to monitor testimony very carefully, and I will expect counsel to confer with their witnesses in advance of testimony to explain the limitations of testimony to them. I also will not hesitate to admonish witness if necessary, and violations will run the risk of the possibility of a mistrial.

This letter will act as the written memorandum of the decision of the Court on this motion. No further entry will need to be prepared.

Sincerely,

/s/ Richard B. Walker
Richard B. Walker
District Judge

RBW:rb
cc: file

SUPREME COURT ORDER

DISTRICT CASE NO. 96CR4903

IN THE SUPREME COURT
OF THE STATE OF KANSAS

ROGER D. STRUBLE
BLACKWELL BLACKWELL & STRUBLE CHTD
400 E IRON
PO BOX 795
SALINA KS 67402-0795

STATE OF KANSAS, APPELLEE, NO.
V 97-80421-AS
TYRON LATWAIN HARDAWAY,
APPELLANT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY APPELLANT, TYRON HARDAWAY.

CONSIDERED BY THE COURT AND DENIED.

DATE: 03/21/2000.

CAROL G. GREEN
CLERK

[1] MCPHERSON COUNTY, KANSAS
NINTH JUDICIAL DISTRICT

STATE OF KANSAS,

Plaintiff,

vs.

Case No. 96 CR 4903
Appeal No. 96-

TYRONE LATWAIN HARDAWAY,

Defendant.

PRELIMINARY HEARING

BEFORE HONORABLE THEODORE B. ICE, District Judge, at McPherson, McPherson County, Kansas, Ninth Judicial District, on the 3rd day of January, 1997.

APPEARANCES

State of Kansas appears by and through MR. TY KAUFMAN, County Attorney, McPherson, McPherson County, Kansas. Defendant appears in person and by and through MR. ROGER STRUBLE, Attorney at Law, Salina, Kansas.

* * *

[41] THE COURT: What's the point?

MR. STRUBLE: Your Honor, as I understand it the issue in this case that's now been raised by the amended complaint deals with whether or not she has the ability to consent to sexual contact. It's my intent to establish that she had been seen or treated by an OB/GYN, that she had the Norplant installed. That the staff people knew and consented to her having sex with her

boyfriend, and that at the time of this incident she was in fact sexually active. And if the, if it's the contention of the State she's not able to consent, I need to explore that area to see if she was in fact consenting to sex at the time with other individuals and that she was in fact doing that with the knowledge of the, her staffing people.

THE COURT: If that's where you're going with this, I'm going to sustain that objection pending further hearing on that.

MR. STRUBLE: If I may have just a moment, Your Honor, to make myself a note.

Q. What was Twain wearing that night??

A. Twain was wearing a striped shirt.

Q. What kind of pants was he wearing? Let me rephrase the question. He was wearing a pair of loose sweat pants, wasn't he?

IN THE DISTRICT COURT OF
MCPHERSON COUNTY, KANSAS

STATE OF KANSAS, Plaintiff, vs. TYRON LATWAIN HARDAWAY, Defendant.	)	Case No. 96 CR 4903

MOTION PURSUANT TO K.S.A. 21-3525

COMES NOW, the Defendant, by and through his attorney, Roger D. Struble, and moves the Court to permit the Defendant to present evidence of the alleged victim's prior sexual conduct.

In support of said motion it is stated to the Court that:

1. Submitted herewith is the Affidavit of the Defendant concerning the alleged victim's previous sexual activity as required by K.S.A. 21-3525.

2. The States claims the alleged victim does not have the mental ability to give consent because she does not understand the consequences of sex. The alleged victim's prior sexual conduct rebuts that assertion and the evidence is necessary in order to provide the Defendant with a fair trial.

WHEREFORE, the Respondent prays that the Court grants his Motion Pursuant to K.S.A. 21-3525 and allow

the Defendant to present evidence to the jury of the alleged victim's prior sexual conduct.

BLACKWELL, BLACKWELL & STRUBLE CHTD.
301 N. Ninth, P.O. Box 795
Salina, KS 67402-0795
(913) 823-5273

/s/ Roger D. Struble,
Roger D. Struble
S.C. #13865
Attorney for Defendant

[1] IN THE NINTH JUDICIAL DISTRICT
DISTRICT COURT, MCPHERSON COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,	)	
Plaintiff,	)	
vs.	)	Case No. 96 CR 4903
TYRON LATWAIN HARDAWAY,	)	
Defendant.	)	

TRANSCRIPT OF

MOTION had before the Honorable Richard B. Walker, Judge of the Ninth Judicial District, District Court of McPherson County, Kansas at McPherson, Kansas, on the 28th day of April, 1997.

APPEARANCES

The Plaintiff, The State of Kansas, appears by McPherson County Attorney, Mr. Ty Kaufman, 223 N. Main, P.O. Box 1264, McPherson, Kansas 67460.

The Defendant, Tyron L. Hardaway, appears in person, on bond and by and through counsel, Mr. Roger Struble, 301 N. Ninth, P.O. Box 795, Salina, Kansas 67402.

* * *

[7] Schulman's report as it may bear on any issues related to the Rape Shield Statute?

MR. KAUFMAN: Not as long as it is confined to this hearing.

THE COURT: I'm sorry.

MR. KAUFMAN: Not as long as it is confined to this hearing. I'm not going to its admissibility wholesale, but –

THE COURT: I understand that. But the Court can read it and consider the contents of it in connection with this hearing. I assume that the alternative would be to call him as a witness here for purposes of the hearing, which he probably would say exactly what he said in the piece of paper. So I think you have got your approval to use it for purposes of this hearing. So, go ahead.

MR. STRUBLE: Your Honor, it would be our position that in this particular case, under the pleadings, that the charge is that my client committed the crime of rape because the victim was unable to give consent due to a lack of capacity. That being the charge, her specific conduct on prior occasions, sexual conduct, is admissible, I believe, under *State versus Bressman*, which is found at 236 Kansas 296, which talks about –

[8] THE COURT: How do you spell *Bressman*?

MR. STRUBLE: Excuse me. B-r-e-s-s-m-a-n.

THE COURT: All right.

MR. STRUBLE: And – and it refers specifically to the statute on the Rape Shield and says that if it is relevant to an issue, such as consent, then it can be used in Court. And I – this is not a case where the defendant is attempting to parade numerous individuals into court to create a disreputable character as the victim may be, I think that is the legislative intent behind the Rape Shield Statute.

In this particular case, our expert has done an examination that any doctor would do, which included taking a history. In determining whether or not this particular person has the ability to consent, he was required to discuss with her such things as good touch, bad touch, what her prior sexual history was, what her plans in the future are regarding family. All of this is laid out in the report.

And, quite frankly, if he would have to give testimony, absent the interview, would simply be just to say, Well, based on my interview of her, without giving details, I come to this conclusion. And I am not sure that as an expert that he should be precluded [9] from testifying as to the basis of his opinion. Certainly that would be something he would be subject to cross-examination on.

And so in this particular case, it is the State in charging the case as it has, that would permit us to get into the prior sexual conduct because it bears directly upon whether or not this woman has an ability to consent. Recalling from the preliminary hearing, the testimony of their expert was that any person with an IQ between 60 and 70 could not give such consent. And Doctor Schulman, of course, with his specificity and this witness will say this: She is very social and she does have that ability. We need to be able to form that basis.

Now, it is my intention, not to belabor the point, I would not necessarily intend to call those five or six people that are referred to in the report; I simply need to have the ability, if the complaining witness denies that she ever had any prior sexual activity. So –

THE COURT: So you would only want to use this –

MR. STRUBLE: I don't necessarily intend to call witnesses, Your Honor, to establish this prior sexual conduct because I believe that Ms. Cooper will,

* * *

[37] THE COURT: All right. I didn't mean to cut you off.

MR. STRUBLE: No, that's fine. I appreciated –

THE COURT: Mr. Kaufman wanted to tell a war story here.

MR. STRUBLE: Well, and it was probably appropriate. And I think that not having the benefit of being there and hearing the argument, I would say that it might apply in this case.

And that is, if we are going to try to prove the social ability of this gal through the social intercourse, we are going to have to have this information. And I – I don't think that this is a situation where – where you can accuse the defendant of just simply trying to trash this woman. We – we are sitting down trying to determine if she really knew what she was doing. And that – I don't see any way around that when that is the way the statute is drawn.

I mean, the State puts on proof that she does have a mental disease or defect, which would, in their opinion prevent her from giving consent. And you have got an expert who is going to say, I have examined her, this is the – how my examination was [38] conducted, this is

what I learned from my examination, this woman does know about sexual intercourse. And – and these are the reasons why. And I think that's just square on point and with that information it should be admitted.

MR.KAUFMAN: Well, I don't want to belabor this and I know it is not my turn, but again –

THE COURT: Well, I am going to give him the last word after you have had your turn.

MR. KAUFMAN: We are not talking about whether she knew about sexual intercourse, that is where we keep deviating from. She had sexual intercourse. But that is not the key. It is whether she had the ability to give knowledgeable consent.

And with all due respect to Mr. Struble's analysis of the case I cited, his client falls right into that. Because one of the chief issues there was whether a stranger who meets a lower functioning person has a responsibility to find out whether they are mentality deficient, and in this case, that issue doesn't even exist. Because the evidence will be, obviously that – that the defendant in this case had personal contact with this – with this woman over months and had access to all of her records and would know of her mental deficiency. So, you know, it's not [39] a question of needing to get in social intercourse here to make the case. And I would say, with all due respect, that's misconstrued in this particular case. But again –

THE COURT: You want a minute?

MR. STRUBLE: Just short, Your Honor. I need 30 seconds.

THE COURT: All right.

MR. STRUBLE: It opens up the whole can of worms about records. If they are going to come in and say my client doesn't – should have known from all those records, because when my client testifies this is what he knew from those records, then I suppose the burden is going to come back to the State and I'll be surprised if all of a sudden those records don't get in under the consent of the victim.

I would also state then too, then it becomes, it now makes these comments even more relevant. What were the observations of my client? If my client, for sake of argument, was sitting there intending to have sex with this gal and knows that she has been having sex with several people, is that not probative? Is that not determinative of what observations that he would make of her so that he could know whether or not she could give informed consent? I suggest that it [40] might be. And so, once again, making that argument specifically about my client as the defendant, and what he knew or should have known, I think it is an issue that we identified than information in.

THE COURT: Well, I haven't read *Bressman* and it has been a long time since I read *Lavery* so I do want to go back and read those. I would be willing to leave the record open for a short period, a week or so, if counsel want to submit any – I don't want any lengthy submissions because I think the – I understand the issue, and you made your oral arguments and I understand the issue, and you made your oral arguments and I understand your oral argument. But I feel the need to run this through ALR and just see if there is any other cases that might be helpful from other jurisdictions. There has got

to be ALR annotation someplace on rape shield that I can take a look at.

But if any of you want a brief window of opportunity to make any submissions of other cases that the Court should consider I'll allow that. But I really don't want to re-invent the wheel here and have a bunch of additional briefs and arguments on the matter. But how does the State want to proceed?

MR. KAUFMAN: That's fine.

THE COURT: If I gave you a week, can you see whether you want to make any additional –

* * *

[1] IN THE NINTH JUDICIAL DISTRICT
DISTRICT COURT, MCPHERSON COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,	)	
Plaintiff,	)	
	)	Case No.
vs.	)	96 CR 4903
TYRON L. HARDAWAY,	)	
Defendant.	)	

TRANSCRIPT OF

PRETRIAL MOTIONS had before the Honorable Richard B. Walker, Judge of the Ninth Judicial District, Court of McPherson County, Kansas at McPherson, Kansas, on the 11th day of June, 1997.

APPEARANCES:

The Plaintiff, The State of Kansas, appears by McPherson County Attorney, Mr. Ty Kaufman, 223 N. Main, P.O. Box 1264, McPherson, Kansas 67460.

The Defendant, Tyron L. Hardaway, appears in person, on bond and by and through counsel, Mr. Roger Struble, 301 N. Ninth, P.O. Box 795, Salina, Kansas 67492.

* * *

[23] Regina Cooper after the Schulman?

MR. KAUFMAN: Yes.

MR. STRUBLE: Yes.

THE COURT: Okay.

MR. STRUBLE: And the Court may know, I think we sent the Court a copy of the Schulman report.

THE COURT: I received and read the Schulman report.

MR. STRUBLE: In the Schulman report it makes it real clear that in discussing it, it says that her forth boyfriend was Jared, she had had sexual relations and had been intimate with him. She then, after that interview and during her interview with Doctor Pearce says, Regina indicated that the alleged rape was the first time that she had had sex.

And I think we have got a – I think we have got a distinct problem here. Which, first of all, she – she's making all kinds of inconsistent statements. And if it is not admissible for that purpose, it creates a situation where my expert interviews this gal about what she knows about sex and her sexual experiences. And I understand that he will be allowed to testify – just simply can't testify that she has had sex before, he can testify about her understanding of sex, and possibly her education in that regard and [24] those types of matters, but can't ask about sexual experiences. But, he would have relied upon her interview and her statements in drawing his conclusions, specifically in this instance, the fact that she has had a boyfriend and she is having sex with him, for – for formulating an opinion.

Now you take Doctor Pearce who at preliminary testifies, I relied only upon the IQ test and I am drawing my opinion that she can't have sex – can't understand sex based on her IQ. Then she goes back and I assume that she has reviewed Doctor Schulman's report, and then

examines Regina Cooper and then takes this interview. And part of her knowledge is that she has never had sex before and this was the first time she had sex. Now, if she –

THE COURT: Do you have her report?

MR. STRUBLE: Yes, I do.

THE COURT: Is it lengthy?

MR. STRUBLE: No, it is two pages.

THE COURT: Let me review that.

(Pause.)

MR. KAUFMAN: I would say, first of all –

THE COURT: Well, let me –

MR. KAUFMAN: Yeah, okay.

THE COURT: I want to read this. Let's just [25] suspend until I read it, so I know what we are talking about here.

(Pause.)

THE COURT: All right. The record should reflect I have read it. I didn't mean to cut you off, Mr. Struble. I just thought I ought to see –

MR. STRUBLE: No, I appreciate it.

THE COURT: – what you are referring to. And I have now read that. Now, if you wanted another minute or so to finish your argument.

MR. STRUBLE: Well, and that is only half of my argument regarding clarification sake.

But I think – when I received your order, I was actually on the road yesterday and so they read it. I didn't see it until after 5:00 when I got back. And I wasn't sure of the details.

And then in reviewing before trial, I discovered the inconsistencies. And it dawns on me, how can – how can we have fair opinions rendered by these experts in this case when they certainly aren't going to be allowed to lay that, all of the foundation. But I have got to be able to cross-examine her on this point now because she has said she has not had sex before this rape.

And that is one of the issues that is going to [26] have to be an issue. Because she originally didn't make a specific individual assessment of Regina Cooper. I assume that is why she went back, at counsel's request, and looked at her specifically to see of she could. In her previous testimony and in the preliminary hearing, under oath, she says she didn't. So now apparently she has. And in taking that history as to this person with an IQ under 70, she says she didn't understand the consequences of sex. And the fact that she claims that she never had sex before this issue has to weigh on part of her opinion and I have to be able to cross-examine on that fact. That's issue number one on that.

THE COURT: Okay. Go ahead.

MR. STRUBLE: The other issue – the other issue stems from the instructions that are going to be given to the jury in the way the case is pled. And I am asking for consideration on this point. And that is, it is a determine – it is a two-step process. First, the State has to show that this woman is incapable of giving consent.

THE COURT: Mm-hmm.

MR. STRUBLE: Then they have to show that my client knew. So, in order to deal with what my client knew or should have known, you have got to establish [27] that my client reviewed records, had a regular course of dealings, made personal observations. That's the way I assume the State is going to attempt to proceed to show that my client knew that she – this woman could not consent to sex.

The evidence would be that MCDS had a specific plan regarding this woman in her having sex. That – that sex was readily permitted. That she was given quality time with another one of their clients. The fact was that they were actually discussing a marriage situation between the two of them and trying to determine whether that was going to be a possibility.

And if my client is aware that she is having sex on some frequent or infrequent basis, does that not impart to him some meaning as to whether or not she has the ability to consent to sex? And that's – that may be a factual dispute, but that's the reason for proceeding on those grounds.

THE COURT: So you are saying, in effect, and going back to kind of the *Bressman* decision which kind of lays some of the – of the law down for this, that that has probative value on the issue of knowledge of the alleged offender, Mr. Hardaway.

MR. STRUBLE: Well, certainly. I mean, what you get in a situation where if he knew that she was [28] having consensual sex with somebody else, wouldn't it be

reasonable for him to assume that she knows about sex and could consent to sex?

THE COURT: Okay.

MR. STRUBLE: And so if we are not allowed to explore that area, then I am – he certainly is denied the opportunity to rebut the State's argument. And is the State even allowed to have any reasonable inference drawn in that respect? They have got to establish somehow that my client knew.

THE COURT: Were you finished?

MR. STRUBLE: Yes, sir.

THE COURT: Obviously, give him a chance to respond.

MR. KAUFMAN: Well, taking the first issue with respect to –

THE COURT: Doctor Pearce's –

MR. KAUFMAN: – Doctor Pearce's statement, I would tell the Court that her second interview with – with Regina was actually accomplished before she ever saw Doctor Schulman's statement. Because, as you can see, the – her second –

THE COURT: Just a minute.

MR. KAUFMAN: So, she wasn't loading up somehow on this particular thing and didn't see Doctor

* * *

[1] IN THE NINTH JUDICIAL DISTRICT
DISTRICT COURT, MCPHERSON COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS, Plaintiff,	)	Case No. 96 CR 4903
vs.	)	
TYRON L. HARDAWAY, Defendant.	)	

TRANSCRIPT OF

JURY TRIAL PROCEEDINGS had before the Honorable Richard B. Walker, Judge of the Ninth Judicial District, District Court of McPherson County, Kansas at McPherson, Kansas, on the 15th day of September, 1997.

The Plaintiff, The State of Kansas, appears by McPherson County Attorney, Mr. Ty Kaufman, 223 N. Main, P.O. Box 1264, McPherson, Kansas 67460.

The Defendant, Tyron L. Hardaway, appears in person, on bond and by and through counsel, Mr. Roger Struble, 301 N. Ninth, P.O. Box 735, Salina, Kansas 67432.

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[17] minutes.

(At this time a recess was taken, after which continued the following proceedings outside the presence of the jury:)

THE COURT: All right. We are back on the record. The State is present through Mr. Kaufman, the defendant is present personally and with Mr. Struble. The

jury remains in the jury room and I understand, Mr. Struble, there are some matters you wanted to take up before we call the jury in. Let's go to those, please.

MR. STRUBLE: Thank you, Your Honor. May it please the Court. The Court may recall, the reason the case originally got continued was to allow some additional discovery. That discovery has been completed to our satisfaction at this point, but does raise an interesting issue regarding the Court's previous ruling which was effectively done in your letter of June 10th of 1997, allowing under the circumstances in part to – to have some information regarding sexual activity but not – but banning us from getting into prior sexual acts.

First off, what we, I guess I'm asking the Court [18] for clarification on – on the order. What we have are reports that have been generated in the ordinary course of Regina Cooper's life with MCDS. There are staff reports, there are assessments, all of which make references to her developing sexual knowledge, for lack of a better term at this point, specifically in January of 1993.

There is an assessment that is done and it's captioned under Social Development and it talks about interpersonal relationships and then goes on to talk about the sexual awareness section and it talks about, which I think is relevant in this particular case. As the Court's aware, either that information is, in my opinion, is either relevant what she knows, and we can get at that through other assessments, or there is simply a case of the two experts who are going to testify that she didn't have – one who says she didn't have and the other said she did have requisite mental capability to decide about sex.

It is my contention that given this report in December of 1995, it indicates that she does verbalize correct information on certain things. And it goes on to the rest of the stuff, all of which we believe to be relevant regarding her ability to consent to giving sex. And I think that's the issue in this case. [19] Doctor Schulman's report itself discussed in greater detail what she was able to know and did know.

I understand the Court's prior ruling that we should not get into the fact of her existing sexual relationship but by way of example there, there are reports in here that indicate that at the time of the report, they were talking to her about sex and about marriage and her plans for marriage. She is making inquiries about sex and about certain aspects of it, all of which, we think, specifically are relevant. If not relevant to present through an employee of MCDS regarding this assessment, certainly it provides relevant information for me to cross-examine their expert witness, who has drawn a conclusion that she's unable to consent to sex when prior psychological reports and evaluations have said to the contrary.

And so, it's my contention that I should be allowed to use that information which we obtained, for purposes of cross-examining the witnesses in the State's case-in-chief.

THE COURT: We may have to take this up after the State's expert has testified. Quite frankly, since I didn't do the preliminary hearing, and I have read the transcript, although that was three months ago at least at this point, I am of the opinion that [20] probably what we should do is recess between direct and cross and have

you tell me what kinds of things you want to get into and then have me make a ruling at that time, rather than, because I – I – I'm having a little difficulty grappling with the issues here until I hear the direct testimony on things.

MR. KAUFMAN: May it please the Court. I don't even know what counsel is talking about. He is being so vague that what he is talking about, I don't even know what he is talking about. As I understand what he is suggesting, is that in some meeting with some persons who are at this point not identified, that there was an – some consensus or a statement by somebody that perhaps Regina Cooper should receive some information about sex or marriage. Now, we don't even know who these persons are. They are probably not, I would guess, they are not identified as witnesses in this particular case, nor do we know whether there is any probative value whatsoever. And so just some kind of open-ended thing that – that Mr. Struble now can go forward and cross-examine Doctor Pearce, for instance, about this when we don't even have the persons here who were involved in that assessment, as far as I know, to be examined about it, and what the nature of it was or anything else, I [21] think is just out of line.

Certainly, I don't think the Court's in any kind of position to make any ruling period based upon the vague kinds of claims made by Mr. Struble and who made them and who was present and whether those persons are witnesses and whether they are even available. Certainly, I don't think that they can come in.

For instance, Mr. Struble should be able to say, Now, Doctor Pearce, for instance, I had this report that says

that – that this young lady was to get some sexual training and that's contrary to what you have said, isn't it? And Doctor Pearce obviously wasn't involved in that. She has testified that she didn't – wasn't privy to any of those records.

So I certainly object to the methodology which we are going about here, given the vagueness of it, who these persons are and so on and so forth. I agree that the Court can't, at this point, entertain any kind or make any kind of a ruling based upon the vagueness of the hearing requested by counsel.

THE COURT: You may respond, Mr. Struble. I think what I am probably going to need to do is wait until the State's expert testifies and have you say what, what you would like to get this to and then rule on it at that point.

[22] I thought I made it pretty clear in my letter that the line I felt like I was drawing was a res gestae line of things which occurred and were said on the day that the incident is alleged to have occurred back in October of 1996, because I think to do otherwise, I believe it chops it up and it – it lets – it gives the jury kind of a distorted picture of what happened. But – but once we get beyond that, the farther we get away from the pure res gestae of what happened on – on October 13th, that's what the day was, the more likely I am to keep it out as the prejudicial value outweighing the probative value. And I thought I tried to draw –

MR. STRUBLE: I understand that. I guess my grasping about prejudicial, certainly impeaching testimony is always prejudicial to – to when the State's expert

renders an opinion, which is the sole basis of the prosecution is on. In this particular instance, the witnesses that were present at the staffing are – are under subpoena and will – will appear to testify. Now, we –

THE COURT: Now you are talking about Mr. Stacey and Mr. Colucci or who?

MR. STRUBLE: Correct. And others. Others who participate from time to time. Now, I am saying [23] that I pulled out of that, a box that had to be at least two feet long containing records on this woman, and we pulled out about three inches, and certainly have done our work to determine what in there deals with her information about sexual items, I guess. I don't know how to say it.

The woman was – was talking about sex, was having sex, was asking questions about marriage and about having a family and if that is not relevant to the issue in this particular case, even at this late date, maybe I would have to admit, I don't understand the issue in the case. Because it deals with whether or not this woman suffers from a disease or defect to such a point that she does not understand the consequence of having sex. And those issues that have been dealt with over the course of her – not specific instances of sexual contact, do specifically weigh upon that opinion and upon how the jury can draw that conclusion.

Otherwise, to limit that prevents my client from effective confrontation of the witnesses. And that's where we are coming from.

I'll pull that out for the Court.

THE COURT: I think you better do that because right now, I feel like we are still a little [24] shadow-boxing because I don't know what you are referring to. You have read it. You know what you are talking about. You know what questions you want to ask. I don't. And all I can say is, until I have a better grasp of exactly – and I may grant you –

MR. STRUBLE: I understand.

THE COURT: – what you are asking. But I'm not sure what it is you are asking right now.

MR. STRUBLE: I will pull it.

THE COURT: And until I review what it is you have read and you have planned to do, I am not going to give you a blank check saying, sure, anything that has to do with those areas, get into and don't worry about it. I think that I have got to know in more detail what you want to do, and what kinds of questions you want to ask and what the underlying reports say. So I can say, Yeah, that's fair game, go ahead or, No, that's way off base.

And – and even though it might be impeaching, it gets – it throws us over into the Rape Shield area that I think is going – that it implies specific instances of sexual conduct and – and it's a back door way around the Rape Shield Statute. So I just don't know what you are doing, and until I feel comfortable with what you are doing I'm not going to [25] say, Yeah, you can do it or, No, you can't do it.

MR. STRUBLE: I then am taking the Court's decision at this moment only in light of making my opening statement. I will not make any references – I

have no intention of violating the Court's orders in this case and I understand that the Court should be entitled to review those specific things that I'm speaking about before rendering a decision. And I can live with that. I think I can make my statement without making those specific comments.

THE COURT: I am going to have to insist that you do because, otherwise, I think we get into just – well, a mistrial, if it gets too out of hand. And I don't think we want to go through that again.

MR. STRUBLE: No, we have been on that brink for some time. Second issue though, which is a little clearer, is and I don't know that I necessarily have to bring it up in opening but I will bring it up, and that is impeaching the victim/witness in this particular case with evidence of bias or prejudice or motive through the – her threatened $750,000 lawsuit.

THE COURT: Well, do you have any evidence? Do you intend to introduce evidence concerning that at some point or how –

MR. STRUBLE: I intend –

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[156] to excuse the jury and talk about something, we will.

MR. STRUBLE: I just want – I just wanted to make a record that I wanted to enter into some of the areas that the Court previously ruled on.

THE COURT: Well, I guess I don't know quite what you are doing here, so, perhaps we should excuse

the jury for a few minutes. We'll try to keep this short, members of the jury. If you'll please retire, we'll get back with you very quickly.

(The jury leaves the courtroom.)

THE COURT: We need to make sure the doors are shut here, so if you'll – all right. The jury has left the courtroom. Mr. Struble, what's the situation?

MR. STRUBLE: Well, Your Honor, simply the area of her knowledge regarding sex and the information that he obtained regarding the – the private time that was allowed as a, as the program facilitator and the arrangements that were made by the company for Regina to engage in sexual activity.

MR. KAUFMAN: I don't know if counsel –

THE COURT: Well, I thought I already ruled on that.

MR. KAUFMAN: You did.

[157] MR. STRUBLE: I understand, Your Honor, and that's what I'm saying. I think I am not allowed to go into those areas –

THE COURT: That's right.

MR. STRUBLE: – in front of the jury. And I'm just trying to preserve the record. And if the Court can just indicate that to me –

THE COURT: If you are trying to get into areas that were covered by my letter ruling of the 10th of June or whatever it is, then I'm going to forbid you to do so.

And if that was a request to do so, then that's denied on the record at this point. So –

MR. STRUBLE: Okay. I just wanted to make this as part of the proceedings so that for purposes of appeal, I would proffer that we would get into those areas that the company did routinely provide private time so that she could engage in sexual activity; that this information was known to all of those that worked with her, including her staff coordinator or program facilitator, her case manager, all through the hierarchy, that this woman was given an opportunity to engage in sexual activity under their auspices, after it had been staffed by all those people dealing with Regina Cooper.

[158] THE COURT: I'm going to re-read from the second page of my letter. "In this case the Court believes that the jury should be entitled to hear the full scope of events which occurred on the date the crime was alleged to have been committed. To this extent, I believe that any conversation between the defendant and the alleged victim concerning why she was distraught and the immediate circumstances which led up to the alleged sexual activity between the defendant and the victim would be admissible, as part of res gestae of the crime. As such, I believe it serves an important function in letting the jury see the full scope of activities on the day of the crime and as such has probative value.

However, the Court feels differently with respect to the evidence of prior sexual activity with other persons, or on other occasions, on the part of the victim, including testimony concerning implanting of any birth control devices. I believe any testimony such as that runs into

dangerous ground as to whether any prior consents were obtained, whether criminal activity was engaged in by other individuals who may have had sexual conduct," I think I meant contact, "with the alleged victim, and medical reasons for any birth control devices. The sole issue, it seems to [159] the Court, should be whether or not consent was properly able to be given to Mr. Hardaway on the date in question. Prior sexual conduct of the alleged victim does not seem probative on that issue, and therefore will not be admitted by the Court."

That is my ruling. If that is a request to reconsider and get into the areas that I dealt with, then that is overruled.

MR. STRUBLE: Thank you, Your Honor.

THE COURT: Okay. Well, I've got the bailiff coming.

MR. STRUBLE: Your Honor, I have two or three more questions of him and we're finished with him, of this witness.

THE COURT: Okay. Bring them in.

(The jury enters the courtroom.)

THE COURT: Okay. Be seated. Members of the jury, we are going to try to recess tonight somewhere between 5:00 and 5:15. I can't promise you an exact time, but we are not going to be working late tonight. We'll have to wait and see how things go tomorrow before I can make you any promises about tomorrow, so. But, all right. Mr. Struble, you may continue.

MR. STRUBLE: Thank you.

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[195] testimony elicited from Denise Bobadilla included that there was a discussion with Mr. Hardaway July 4 of '96. At that point she indicated that the history of the victim in this case was discussed in great detail, that that was normally done; what her likes and dislikes were, what should be done regarding this particular client; how to protect yourself. And that was stressed, all information concerning this client was available to him, on site. Every – the information regarding her IQ tests and other results and staffings were supposed to be available. It simply is my contention what's happened is that the State has opened up the door that would allow us to get into discussions, the information that was, in fact, available to my client.

The issue in this case as framed by the prosecutor in the beginning is that my client knows or has reason to know that she is incapable of consenting to sex. And it is my contention that the file is replete with a situation where this woman was – was routinely going through and getting information regarding birth control, regarding the act of sex itself, about marriage, about disease. These were all relevant informations that would lead one to conclude that a person that has those capabilities. And then [196] – and as framed by the State, it's not what you or I believe, it's what Mr. Hardaway would have believed at the time. And to raise an inference that it is just simply, well, an IQ was available and this is on a front sheet, a statement competent versus incompetent, is – is too simplistic as to what the situation is.

What they want to do is have into the evidence that there is a statement in her file that says she is incompetent. The rest of the file that would be routinely available, which they claim was available to my client, is to be ignored. It's our contention that if you're going to, in this particular case, hold him to a standard, you being the law, is going to hold him to a standard as to what he is going to know at the time, then the information that he did know is relevant and should be admissible into evidence.

Specifically, it's my contention and, of course I have to lay a better foundation with Denise Bobadilla because I'm not exactly sure yet after her testimony what her standing was with Regina Cooper, and what she truly knows was available, but I believe that she would, and certainly Sheila Grubbs and those other individuals that had dealt with her on a regular basis, that are going to be called as witnesses, would substantiate that they have an IHP or an ISP or they [197] have changed the initials to something, but it is a staffing with everybody who deals with the client on an annual basis and various goals are addressed with the staff and with the client.

And in the course of this, routinely was staffed on what's human sexuality training needs, socio-sexual skills. And these are all routinely addressed and the information that is obtained from that then is given down to the individuals who work with the clients, saying, this is an area that you need to work with.

And they do it by a testing process. And included in that testing process and contained in their file is information which would indicate that she had knowledge about

sexual intercourse, that intercourse leads to pregnancy. She knows slang words for sexual intercourse. She is able to quantify or verbalize about two kinds of love. She is able to give correct information when dating.

This is all information, obviously that is available, apparently through this witness, that is known by my client, that forms the basis at some point, as I have indicated earlier, to attacking the credibility of the expert who comes in and propounded the opinion, she can't consent to sex because she didn't have cognitive reasoning when it comes to sex.

[198] And to say to the jury that all this information is there and then not allow my client at some point to bring out either through cross-examination of witnesses or through his own testimony, that what information truly is available, and what he knows about this gal does not present – does not give my client to present a fair defense.

And so it is my contention that the State, in going into this at this point in time and asking those questions, has – certainly the door has been opened for purpose of cross-examination so that I can get into those elements that are contained in that file and what my client would know or wouldn't know as a result of that file.

THE COURT: Mr. Struble, I have a clear recollection of at least several hundred pages here of documents several months ago. I take it from your comments that you have been able to sift through that and narrow it down to a smaller packet of documents that – that gets into these areas that you feel have adduced sexual awareness; is that correct?

MR. STRUBLE: Yes, sir.

THE COURT: I think probably I need to take a look at those overnight before I rule. Maybe it is just because I'm hot and tired that I – I'm having [199] some difficulty focusing on this issue but I'm going to let Mr. Kaufman respond, but I think probably what I need to do is have Mr. Kaufman and I take a look at what – what you have got and what you, specifically, what you propose to get into overnight and talk about this at 9 o'clock before we continue the cross-examination.

Do you have any objection to that?

MR. STRUBLE: No. Uh, in fact, I realize it takes, I – the Court's coming from Newton and I'm coming from Salina but I would even propose that in order to get things moving with the jury, I can – I'll beat it down here by 8:30 in the morning, if the Court would be so inclined to give us a start that maybe we have it done so when the jury shows up at 9:00 we can – we can get close to getting started in the case.

THE COURT: I can probably be here a little early. I have some responsibilities for a five-year-old in the morning, so I certainly – it is a little hard to get in a lot earlier than that.

MR. STRUBLE: I can sympathize. I – I understand. Well, and I have several that I take care of so –

THE COURT: It depends on how fast the cereal

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DISTRICT COURT, MCPHERSON COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,	)	Case No. 96 CR 4903
Plaintiff,	)	
vs.	)	
TYRON L. HARDAWAY,	)	
Defendant.	)	

TRANSCRIPT OF

JURY TRIAL PROCEEDINGS had before the Honorable Richard B. Walker, Judge of the Ninth Judicial District, District Court of McPherson County, Kansas at McPherson, Kansas, on the 16th day of September, 1997.

APPEARANCES:

The Plaintiff, The State of Kansas, appears by McPherson County Attorney, Mr. Ty Kaufman, 223 N. Main, P.O. Box 1264, McPherson, Kansas 67460.

The Defendant, Tyron L. Hardaway, appears in person, on bond and by and through counsel, Mr. Roger Strubel, 301 N. Ninth, P.O. Box 795, Salina, Kansas 67402.

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[4] (The following proceedings were had outside the presence of the jury:)

THE COURT: All right. We are back on the record in State versus Hardaway, CR 4903. Today's date is Tuesday, the 16th of September.

When we recessed yesterday we were in the middle of the cross-examination of Denise Bobadilla by Mr. Struble.

State is present through Mr. Kaufman, the defendant is present personally with Mr. Struble at this time. The jury is here; has not as yet been called in. There are some matters we need to take up, apparently.

I have reviewed the documents that Mr. Struble was referring to yesterday and I think, Mr. Kaufman, you have been given a chance to look through those also; is that correct?

MR. KAUFMAN: That's correct.

THE COURT: All right. I guess, Mr. Struble, we need to have some idea of, now that we both had an opportunity to re-examine the documents, exactly what it is you propose to do.

MR. STRUBLE: Use information contained in those reports, Your Honor, to cross-examine Mrs. [5] Bobadilla. Specifically information about – if I could back up for just a second. Yesterday in the course of her testimony she testified under oath about information that was available to my client. In fact, she went so far as to say all information concerning the victim in this case was available to my client. All of that information would form a basis for his knowledge, which as I note in the Court's instructions, proposed instructions, which condition was known by the defendant or was reasonably apparent to the defendant.

And we are talking about the condition. And what is it? Is it just simply her IQ or is it all those facts that are

attended to this particular individual? I submit to the Court that it is not just simply her IQ that is in question in this case, unless the State can establish that my client would know or normal people would know that a person of that IQ couldn't have sex.

I don't – I don't think that's their contention and so when they specifically are trying to hold my client to having this knowledge, they have brought forth that fact to the jury, that he knows because he has access to all of the information, then I think we are free to cross-examine on all of the information in

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[11] things were things that I had already seen, having read them when they were submitted for in camera inspection back three months ago. As it comes up in this context, I think we have to be extremely careful. I'm not going to change my ruling on Rape Shield because I think it was the right one.

Now, the problem is, we have to draw a line here. It almost gets back to that old adage that if you can think about a thing that is related to something else without the – without thinking about the thing to which it is related, then you have a legal mind.

Well, what's going to happen here is I am not going to permit – first of all, there are some things I am going to permit and some things I'm not going to permit. I am not going to permit discussions about actual sexual conduct, physical sexual conduct. I'm not going to permit it. I think that is a violation of the Rape Shield Act.

Now, I – I can distinguish on a basis that I think there is room for rational discussion about the mental functioning and that, of course, has the whole issue here, having to do with – with knowledge and certain level of sophistication in dealing with sexual matters.

Now, I think there may be a foundational problem [12] in getting some of those things through Ms. Bobadilla. I don't know exactly what she knows. And quite frankly, I share some of the same concerns that Mr. Kaufman does. That I don't think you can just give her the sheaf of papers, as we all looked through last night and saying, you know, what – what all – what all is in here? I think there is some foundational problems with doing it that way.

I guess what is useful for me to think about in my mind, is the distinction between the thought processes, which I think probably is legitimate to inquire into, and what staff knew about the thought processes, but get away from the physical activities itself, which would involve prior sexual conduct of Mrs. Cooper.

Now, that is a delicate line to walk. And, quite frankly, if I were in Mr. Struble's shoes, I don't know how I would hash that out, I would be able to separate questions. But again, all witnesses are going to be under the instruction that they are not to deal with prior sexual conduct itself. But as far as attitudes and level of knowledge concerning sex, independent of the physical activities themselves, I think that's probably legitimately to be inquired into because that – that has to do with mental functioning [13] on October 13, 1996.

Now, I realize that – that is slicing it pretty thin. It may be hard to deal with one without dealing with the other. And if it is, then you can't get into it. But if you can ask your questions in such a way, with the witnesses having been instructed that they are not to get into the prior sexual activity of – of the victim, then I think probably you can make that inquiry as to what her thought processes were and what her level of information concerning it was and there was some – there were several things in there that says she's interested in family planning matters, she's interested in knowing more about parental responsibility, various – those kinds of things. I guess I don't feel any problem with that kind of thing. When we start getting into discussions however, about her sexual activity, then I have got a problem. If that comes up, I'm going to start to sustain the objections. I'm going to start cutting people off really quickly.

Now, I don't know how you are going to walk that line, Mr. Struble. I really don't. That's your problem to walk that lime. You – you want to – you want to walk in dangerous territory, you want to get into this, I told you what the ground rules are. I [14] will not and I am re-emphasizing my ruling, because I think it is clear that that is the law of the State of Kansas and I just think that that – it gets us into some perilous territory to get into actual sexual conduct itself, as far as – as far as the physical activity is concerned. As far as mental activity, of level of sophistication and knowledge about questions that may have been asked, ideas that may have been discussed with her, that – I can – I can, in my mind, distinguish that and think that probably bears on the – on the issue of mental functioning.

So, I'm going to have to have to insist and enforce a division between – between the physical act and the discussion of mental thought processes. Now how that comes out in your cross-examination, and particularly in light of the fact that I don't know what Ms. Bobadilla knows and what she doesn't know, and – but she is going to be instructed that she is not to make any reference to prior sexual conduct of the victim. If you can somehow ask questions that get to the thought processes and knowledge, then I probably am going to not cut you off. But if we start getting into areas that involve physical conduct, then – then I am going to come down pretty hard on things.

MR. STRUBLE: Your Honor, so we could – I [15] don't mean to be dancing, I just want to make sure I cover this so we don't have the problem in front of the jury. I realize that I am not able to ask about specific instances of her having sex with any individual. I realize I am able to possibly get into those areas in cross-examination of asking about, about her discussions regarding birth control, about family planning, other family planning matters, her proposals to be married at some point and how she discussed those things. There is some reference in there, and I guess here's that area where she talks about wanting more information about sex so that she can have sex and it doesn't hurt. I guess I read that at some point.

THE COURT: I think that – that's a back door way of getting into it. I will not accept that kind of a question.

MR. STRUBLE: I understand. I want to touch that area, that is why I am saying I don't want to go there because, to me, it talks specifically about it.

THE COURT: I am going – as close as I can, I am going to draw a physical/mental distinction. If it talks about mental thought processes, if it talks about requests for discussions that may have been addressed, I think I will probably allow it. But if [16] it begins to bleed over into an implication of or reflection of physical activity, of actual instances of physical activity in some way, that's – that's going to – that's not going to be permitted.

MR. STRUBLE: I don't intend to ask her any questions whatsoever about the private time that she is allowed or anything like that because I think that raises that inference. I just want to know about the sexual education training and inquiries that Regina was making. And maybe Ms. Bobadilla knows nothing of that. I have other people under subpoena that can come in and testify to that fact, though.

THE COURT: Well, and I'm not going to let you baptize through her a bunch of reports that she didn't author.

MR. STRUBLE: Your Honor, I intend to not introduce a single, solitary report. They are only for my purposes of cross-examination and I don't intend to use those reports other than to give me information that I may ask questions about. The witness may not have any knowledge about that. They may not know about those reports, that's fine. I'm trying to draw that distinction for the jury, what somebody might actually know in that position.

THE COURT: Well, as long as you can keep the [17] – the mental process, physical activity distinction from creeping in here, then as long as you are staying on the mental thought processes, then you're probably going to be okay. Once you start getting into physical activity things, I'm going to be – I'm going to be real quick to cut you off.

MR. STRUBLE: I might ask for the Court's indulgence that we bring the witness in before I commence my cross-examination before the jury comes in and the Court admonish her not to discuss those matters because this is not my witness. I would not know if she would blurt something out in that respect and I would want her advised that she is to avoid making any representations of specific instances of sexual conduct.

THE COURT: I think that may be best handled simply by having Mr. Kaufman instruct her.

MR. KAUFMAN: She has already been instructed. Now counsel is in charge of what he is going to ask her and she has been instructed that prior sexual activity is not to come into this trial.

THE COURT: All right.

MR. KAUFMAN: And so he's – he's the governor of what he asks and he is going to have to phrase his questions in such a way so it doesn't come in.

[18] THE COURT: If she has – if she has been so instructed, then we probably don't have a problem. That was based upon my earlier rulings.

MR. KAUFMAN: The other question I have, first of all, in your original ruling, you ruled that other

items such as Norplant were not permitted. As I understand it, your – has that been changed in some way? Because as I understand counsel, he wants to ask questions about, didn't she ask about birth control, didn't she have Norplant, so on and so forth. And I thought that has already been ruled on by Your Honor and you said that that wasn't going to come into this case.

THE COURT: No. Items concerning actual installation of birth control devices will not be permitted. No, I wouldn't permit that.

MR. KAUFMAN: And the – the final question I have is and again, I have reviewed these reports, and many of these reports either one, the person who authorized the report is not here, not under subpoena by anybody and as far as I know, not available; and secondly, one of the – the reports which I assume that counsel would like to get into with this thing called Personal Management of January 3, 1996, which has a whole bunch of check boxes, is not authored.

* * *

[177] MR. STRUBLE: I don't need very long, a couple minutes, just to reiterate to him about – we – I have had an opportunity to tell him about the Court's order and I think he is pretty well clear that he is not able to testify about specific instances. I know that there were some specifics in his report and we have talked about trying to make sure we can –

THE COURT: Yeah, I think you better. I don't know if you have talked with him since those events, so

perhaps five minutes spent with him just to kind of prepare his testimony. We'll recess for five minutes.

(At this time a recess was taken, after which continued the following proceedings, outside the presence of the jury:)

THE COURT: All right. We are back on the record. The jury almost came in the courtroom but we stopped them and they are not present.

Mr. Struble, you have something else you want to take up before we go to the defense's case?

MR. STRUBLE: Yes, Your Honor. Once again, I want to just renew my request. Doctor Schulman's report does contain a result of his interview with Regina Cooper that occurred on April 16th, 1997. That [178] report is replete with instances of prior instances of sexual conduct and I am just making that request once again for the record, for purposes of preserving that issue. I would proffer that the doctor could testify regarding those sexual events as relayed to him by Ms. Cooper during the course of his examination.

THE COURT: Mr. Kaufman?

MR. KAUFMAN: State's position is the same it has been since we started and the Court has ruled Rape Shield rules in this case and we ask the Court to continue with its orders.

THE COURT: Do you have – I think I saw his report back a long time ago. Do you have that available?

MR. STRUBLE: Yes, Your Honor.

(Pause.)

THE COURT: I realize you are going to have to be somewhat careful. In having reviewed the report, I understand you're going to have to be somewhat careful but I think you are going to elicit the testimony that you seek without direct reference to sexual experiences. I am going to leave my earlier ruling in place. Your request for modification is overruled. So, all right.

MR. STRUBLE: Thank you, Your Honor.

* * *

[197] the basis of it, not just what appeared to him, what – what his basis for this answer would be. I object to the question without foundation.

MR. STRUBLE: I'll ask the foundation question, I guess, Your Honor.

Q. (By Mr. Struble) Based upon your testing and your interview that you conducted with Regina Cooper, did she appear to you that she had little training in or education involving human sexuality?

A. I didn't ask her if she had classes, per se, but she volunteered so much information about good, bad touching, just commenting on that spontaneous and she knew there was differences and that she also gave me information when asked about medications that she used, she told me about having Renoids Syndrome and using medication for that, and then she told me about using birth control and she told me that she had used one kind of birth control, had trouble with that and used –

MR. KAUFMAN: Excuse me, Your Honor. May we approach again?

THE COURT: Well. I am going to just halt things there. And you'll continue on. So, I am going to halt the answer. Go to your next question.

MR. STRUBLE: That's fine, Your Honor.

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[1] IN THE NINTH JUDICIAL DISTRICT
DISTRICT COURT, MCPHERSON COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,	)	
Plaintiff,	)	
	)	Case No.
TYRON L. HARDAWAY,	)	96 CR 4903
Defendant.	)	
	)	

TRANSCRIPT OF

JURY TRIAL PROCEEDINGS had before the Honorable Richard B. Walker, Judge of the Ninth Judicial District, Court of McPherson County, Kansas at McPherson, Kansas, on the 17th day of September 1997.

APPEARANCES:

The Plaintiff, The State of Kansas, appears by McPherson County Attorney, Mr. Ty Kaufman, 223 N. Main, P.O. Box 1264, McPherson, Kansas 67460.

The Defendant, Tyron L. Hardaway, appears in person, on bond and by and through counsel, Mr. Roger Struble, 301 N. Ninth P.O. Box 795 Salina, Kansas 67402.

* * *

[40] during the direct examination, I would intend to ask Mr. Hardaway about two specific areas that I think the Court's ruled on in the past. But for the record, I am proffering that I would ask Mr. Hardaway about the threatened lawsuit which has been generated by Mrs. Cooper. The other area is based upon the fact that he is

charged in this instance with knowing or having knowledge, and I would ask him questions specifically about Regina and the fact that she was engaging in sexual activity and how that imparts on his knowledge of her ability to consent to having sex.

THE COURT: Well, I have obviously indicated that those are areas that I'm not going to allow you to do so your request to do so is overruled and you're instructed to stay away from those areas. I understand you're simply making a record here, and certainly this is not something that's the final word. If there is a conviction, the appellate court will have the final word on the matter but you – I'm going to stay consistent with my ruling here.

MR. KAUFMAN: I would just like the Court to note a continuing objection by the State so that I don't have to jump up and down if we get to such a question. But I would obviously object. But I would certainly want the Court –

* * *

IN THE DISTRICT COURT OF MCPHERSON COUNTY, KANSAS

STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. 96 CR 4903
TYRON LATWAIN HARDAWAY, Defendant.	)	

MOTION FOR NEW TRIAL

(Filed Sept. 30, 1997)

COMES NOW the Defendant, Tyron Latwain Hardaway, by his attorney, Roger D. Struble, and moves the court to set aside the verdict entered herein and grant him a new trial. In support of this motion, the Defendant states:

The failure to admit evidence of the victim's prior sexual conduct, including the fact that she was sexually active with the approval of her guardian, denied the Defendant a fair trial. If the evidence had been received the jury would not have found the Defendant guilty. The evidence was clearly more probative than prejudicial and should have been admitted. The evidence sought and the reason for its admission is not the type of evidence that should be excluded under K.S.A. 21-3525.

WHEREFORE, defendant prays for a new trial and for such other relief as the court deems appropriate.

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/s/ Roger D. Struble
Roger D. Struble, S.C. #13865
Attorney for Defendant

[1] IN THE DISTRICT COURT OF
MCPHERSON COUNTY, KANSAS
NINTH JUDICIAL DISTRICT

THE STATE OF KANSAS, Plaintiff,	CASE NO. 96-CR-4903 SENTENCING HEARING
vs.	(FILED June 1, 1998)
TYRON L. HARDAWAY, Defendant.	

TRANSCRIPT

Proceedings had before the HONORABLE RICHARD B. WALKER, JUDGE, at McPherson, Kansas, on the 8th day of December, 1997.

APPEARANCES

The plaintiff appeared by its attorney, Mr. Ty Kauffman, McPherson County Attorney, P.O. Box 1302, McPherson, Kansas, 67460.

The defendant appeared in person and by his attorney, Mr. Roger D. Struble of the firm of Blackwell, Blackwell & Struble, Chtd., P.O. Box 795, Salina, Kansas, 67402.

* * *

[8] THE COURT: It's Dr. Shulman's report that was previously filed with the Court, I believe.

MR. STRUBLE: Yes, Your Honor. And if I might, I won't belabour the point and the issues are still the same, and we do.

MR. KAUFFMAN: Excuse me, Counsel. Are we on the Motion for New Trial or still on the Motion for Acquittal?

MR. STRUBEL: The Motion for New Trial.

THE COURT: I've ruled on the Motion for Acquittal.

MR. KAUFMAN: Alright. Okay.

THE COURT: So we're on the Motion for New Trial.

MR. STRUBLE: Concerning the Motion for New Trial, Your Honor, the issue about what would come before the Court certainly was different than what was presented to the jury. The jury, under the Court's ruling, was not allowed to hear about the prior sexual conduct of the victim in this particular case. It is significant for several different reasons. By the Court denying us that opportunity, as evidenced by the psychological examination report of Dr. Schulman, we were prevented from effectively cross examining [9] the victim in this particular case on that issue. For example, in her report to Dr. – or in her interview with Dr. Schulman, she discussed at length her prior sexual conduct. Yet, in her statement to the State's expert, on which the State relied to establish that she could not consent to sex, she denied prior sexual activity. And that's significant. But, under the Court's ruling, we were not allowed to properly cross examine regarding that inconsistency and how that might affect her rendering that opinion. Under the circumstances, we would submit to the Court that had the jury been told by

competent testimony about facts such as the sexual conduct that had been going on for several years prior to this incident, had the jury been told about the different – in detail, the different sexual education efforts made by her careworkers, by the fact that her guardian and her careworkers were arranging for and consenting to sexual intercourse with other individuals prior to any sexual conduct with my client, we submit that the jury would have been faced with entirely different issues than it was when it went to render a decision in this case. The – In retrospect, and it's my opinion [10] that's what the Motion for New Trial allows us, a chance to look back and reflect upon what actually did come into court versus what could have come in had the motion not been denied, and under these circumstances I – I've rarely seen a case that cries out more for the granting of a new trial. I always realize there's a hesitancy because of the great burden that is bears upon the State, being its citizens, in funding a second trial for an individual; but in this circumstance, it appears to me that a great injustice has been done. What has effectively happened is my client can't take the stand and reiterate to the jury all the things he knows about this gal. And it's what he knows, under the way the case was charged, that my client – a defect that my client knew or should have known about. And they raised an inference that, well, her psychological reports were available to my client. There's no – My client would not testify to that fact. And if he would testify that, "This is what is known to me," would that not go to refute this alleged psychological report or scoring that may potentially have been in the file? I think under the circumstances in [11] this particular case, I think that that's most

important, especially regarding those conflicts, once again, with Dr. Pearson – or, excuse me, Dr. Pearce. The effect of denial on that cross examination, the impeachment of that report, the information that was contained in Prairie View's own file would go to impeach her – excuse me – on her opinions that this woman could not consent to sex. If they were having sexual discussions with her and these issues were being raised and supervised by other members of Prairie View, yet she comes to a different conclusion, we've got the same institution with the same people in conflict and we're not allowed to point that out to the jury nor are we allowed to impeach because of the Court's ruling that we can't get into that. The scope was narrowly drawn and absent some blunder, we're prevented from getting into that area. And certainly, as I reviewed the – my notes in the case, I see no such blunder where we should have jumped through the door and been allowed to get into the sexual conduct. And I think the Court's well aware that throughout the course of the trial, we tried numerous times. We raised the objection several times. We [12] constantly tried to get into that area within the bounds of the law and certainly were denied. But in looking back, I'm asking the Court to grant us a new trial on that grounds.

THE COURT: Alright. Mr. Kauffman, you may respond.

MR. KAUFFMAN: Thank you, Your Honor. Well, as the Court well knows, this particular issue has been argued by Counsel several times, both before and during the course of the trial. And the Court, in its letter ruling, set forth specifically the parameters that were going to be permitted in this case and overruled the

defendant's request as it's now presented for – again, I would say, numerous times. A couple of items I want to note, however. There is no evidence in this case at all that anybody at any of the institutions arranged for sexual intercourse with the victim. That's – That simply is not so and that's not true. The fact that Regina Cooper may have been permitted to date other persons does not imply that they were arranging sexual conduct – sexual intercourse, as put by Counsel, and that's simply not true. The second point that Counsel brought up, with

* * *

[15] be permitted on that issue.

THE COURT: You may close on your Motion.

MR. STRUBLE: Thank you, Your Honor. Your Honor, I – I may substitute in the word "facilitate," "condone," if "arrange" is an inartfully drawn phrase for the actions of their caregivers. But in any event, there was certainly time set aside and made to permit the sexual conduct. The implication that Dr. Schulman was somehow coached or counseled or prepped to explore these areas is false, other than contacting Dr. Schulman to ask him to examine that. Dr. Shulman – That's it. Where Dr. Schulman went with the person in front of him, what he felt necessary to draw an understanding as to this person's ability, was left to him, and I want the record made clear on that point. I think the State misses the point. Assuming for the sake of argument 21-3525 says you can't put that evidence on solely for consent purposes, you've got a situation of knowledge. Knowledge by the defendant. And in this particular instance, my client

knows something, has a wealth of information concerning this person, and can't reiterate that to the jury – under the Court's ruling and under the way the statute's [16] drawn. The issue in this case was not whether or not she could consent, it was her ability to consent. And that's the distinction we draw and that that information should have been admissible. And certainly, I draw that distinction. That's not just splitting hairs under the circumstances. All information that would have been necessary to draw a conclusion about this woman's ability to consent should have been admissible. I understand the Court's ruling. We abide by the Court's ruling. But I'm asking the court to look back in retrospect, knowing what it knows and – and reviewing the testimony and the decision by the jury, and grant us a new trial.

THE COURT: Well, these raise some of the most difficult issues that any court has to deal with and that is the prior sexual conduct. And certainly, I had read Dr. Schulman's report at the time I issued my letter decision on June 10, 1997, in which I essentially tried to draw a – a distinction between those things which occurred on the day in question. And there was some discussion about the state of mind of the victim on that day and prior conduct. And all rulings of court involve line drawing, and I'm not going [17] to sit here today and pretend like that's the last word on the matter because the appellate courts will have the last word on the correctness of the Court's ruling. But it seemed to me, applying the rule of relevance as I understood it, and that is the rule under the statute – and there are various cases, one of which I discussed, the *Bressman* case, which I discussed in my

letter opinion – it seemed to me that there was a relatively clear line. Although in a case like this, line drawing is especially difficult. But I felt that there was a clear line to be drawn between those things which occurred on the day the crime was alleged to have been committed and sexual conduct that may have occurred prior to that time. And that is the line that I drew. And that's not free from criticism. I understand that. But I think that's a rational line. During the trial, that got a little blurry, I know, but that was the decision that I determined was appropriate in the case. We're simply going to have to find out whether the appellate courts agree or disagree with that distinction. I am not going to go back and revisit this because as I have thought this over and – and all throughout [18] the trial, of course, there was – as diligent defense counsel should, Mr. Struble tested that, and he – he made proffers and he pushed right up against the line and he asked questions which required the Court to rule on things, and that's simply the role of careful and diligent defense counsel. That's not meant in any sense to be a criticism of Mr. Struble. In fact, that's his duty, to faithfully and with – with vigor represent his client's position. And he certainly did that. And he – he at every occasion questioned the Court's ruling and I think he's made an excellent record for – for review. But at this point, I'm not able to say that I think that that was clearly erroneous and because of that we need to go back and do this over again. The bottom line is, I'm overruling and denying the Motion for New Trial. It certainly wasn't a perfect trial. I don't know that I've ever been in a perfect trial or that I'd know one if it occurred. But I think it was a fair trial because I took the statute that the Legislature

has provided, I took the rule of relevance that they have provided, I applied it in what appeared to me to be the most rational way to do so, I tried [19] to keep my rulings throughout the trial consistent with that, and the appellate courts are going to look at that and say, "Yes, that was the right thing and that's not a reason for a problem with the trial and not a reason for reversal," or they're going to say, "Well, Judge Walker did not properly draw that line and that distinction and, therefore, Mr. Hardaway should be able to come back again and go through things with another trial." I'm going to let them make that decision because I did the best I could with what I knew about the case, and we'll just have to see whether the reviewing courts agree or disagree with that. The Motion's overruled and denied. Now, I want to make a record at this point that a pre- – And I will file, by the way – It's already, I think, in the record, but I will make sure that Defendant's Exhibit A is – arising out of this hearing is placed on file for further appellate review. There is a presentence investigation that was conducted by Ms. Lemmons of Court Services consisting of a face sheet, some attachments to that, a criminal history worksheet dated October 29, 1997, and I know there's an objection to that and we're going to take that up here in just a second.

No. 97-80421-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff/Appellee

vs.

TYRON LATWAIN HARDAWAY
Defendant/Appellant

BRIEF OF APPELLANT

Appeal from the District Court of
McPherson County, Kansas
Honorable Richard B. Walker, Judge
District Court Case 96 CR 4903

Roger D. Struble, #13865
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Attorney for Appellant Hardaway

* * *

[6] introduce evidence of the victim's prior sexual conduct for the purpose of showing that the victim could in

fact consent to sexual conduct. (Vol. 1, p. 63). After the hearing on the motion wherein the report of Dr. Schulman was received and reviewed by the court, the motion seeking to introduce at trial evidence of the victim's prior sexual conduct was denied with the court issuing the ruling in a letter dated June 10, 1997. (Vol. 1, p. 23; Appendix B). The case proceeded to trial. Additional facts and citation to the record will be made as necessary in the arguments that follow.

ARGUMENTS AND AUTHORITIES

I. THE TRIAL COURT ERRED IN REFUSING TO ALLOW EVIDENCE OF PRIOR SEXUAL CONDUCT.

Appellant's first allegation on appeal is that the trial court erred in refusing to permit evidence of prior sexual conduct.

Standard of Review

The standard of review in determining whether the trial court erred in refusing to permit evidence of prior sexual conduct is whether the trial court abused its discretion. In *State v. Bressman*, 236 Kan. 296, Syl. #1, 689 P.2d 901 (1984), the court held:

> "The rape shield statute (K.S.A. 1983 Supp. 21-3525) allows evidence of an alleged rape victim's prior sexual conduct, if it is proved relevant to any fact at issue, such as the identity of the rapist, the consent of the victim, and

whether or not the defendant actually had intercourse with her. Decisions regarding the relevancy of evidence rest within the sound discretion of the trial court, which should not be set aside absent a showing of abuse of discretion."

[7] EVIDENCE OF THE VICTIM'S PRIOR SEXUAL CONDUCT IS RELEVANT AS TO THE ISSUE OF HER ABILITY TO CONSENT, AS WELL AS, KNOWLEDGE OR THE DEFENDANT AS TO HER ABILITY TO CONSENT.

Under the circumstances of the case now before the court the crime of rape is defined in *K.S.A. 21-3502* as follows:

> "Rape is: (1) Sexual intercourse with a person who does not consent to the sexual intercourse, under any of the following circumstances:
>
> (A) When the victim is overcome by force or fear;
>
> (B) when the victim is unconscious or physically powerless; or
>
> (C) when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably apparent to the offender;"

The allegation in this case is that the victim because of mental deficiency or disease could not consent to sexual activity. The Amended Complaint goes on to charge that

the condition of the victim was known by the defendant or reasonably apparent to him. (Vol. 1, p. 32). As pled, the defendant's knowledge on this point is extremely relevant since it is a specific requirement of the charge. What the defendant knew about the victim was only partially disclosed to the jury.

The defendant was aware that the victim was engaged in a relationship with Jared Base. The fact that she was engaging in sexual activity was known by the defendant but this was not disclosed to the jury due to the court's order under *K.S.A. 21-3525*, the rape shield statute. The existence of this relationship [8] was also disclosed by R.C. during her interview with Dr. Robert Schulman. She admitted that she had sexual relations with Jared Base to Dr. Schulman. (Vol. 5, p. 2, Appendix A). The knowledge of Hardaway regarding R.C. was gained through his employment with MCDS. Prior to trial when the issue was addressed by way of motion as is required by *K.S.A. 21-3525*, the State argued the prior sexual conduct did not necessarily mean that R.C. had an ability to consent on October 13, 1996. (Vol. 10, p. 16). This would appear to be a matter within the province of the jury, and possibly expert opinion. On the ultimate issue to the jury as to whether or not Hardaway had knowledge, R.C.'s conduct is most probative and relevant.

The Kansas rape shield statute generally states that no reference may be made to evidence of the complaining witness' previous sexual conduct with any person, including the defendant, unless, after an in camera hearing, the court finds the evidence is relevant. *K.S.A. 21-3525(2)*. The court ruled that this information was not

to be admitted because its prejudicial effect outweighed the probative value. The trial court went on to hold that evidence of prior sexual conduct was not probative on the issue of whether or not the victim could give consent on the date of the alleged rape. (Vol. 1, p. 85; Appendix B). This ruling is clearly erroneous and an abuse of discretion. The Supreme Court has defined the standard to use when reviewing whether or not the trial court has abused discretion. In *Hoffman v. Haug*, 242 Kan. 867, Syl. #3, 752 P.2d 124 (1988) the court held:

> [9] "the scope of appellate review in matters involving abuse of discretion of a trial court is whether no reasonable person would agree with the trial court decision."

See also, *State v. Stellwagen*, 232 Kan. 744, 659 P.2d 167 (1983). The evidence was relevant to show both the victim's ability to consent and the knowledge, or lack thereof, on the part of the defendant at the time of the alleged rape of R.C.

In *State v. Bressman*, 236 Kan. 296, 300, 689 P.2d 901 (1984), the court states: "the rape shield statute allows evidence of an alleged rape victim's prior sexual conduct if it is proved relevant to any fact at issue." In *Bressman* the victim had told the defendant during the incident that she suffered from gonorrhea. She testified at trial that she made the statement to try and stop the attack. She never testified it was true. The court held since it was being offered solely to challenge credibility and she tested negative for gonorrhea on the day of the incident the trial court did not abuse its discretion in excluding the evidence. The proffered evidence that the victim at one time had gonorrhea was irrelevant and could serve only to

embarrass the victim. In the case before this court the evidence of prior sexual conduct is offered for several reasons which include credibility, knowledge and bears on her ability to consent as defined by the state's expert. Clearly it is relevant and the trial court abused its discretion in denying the use.

The court's ruling greatly impacts the presentation of the defendant's case and denies him a fair trial, which constitutes the abuse of discretion. When the defendant testifies at trial that he [10] thought R.C. could consent to sex (Vol. 14, p. 87). He was unable to support his conclusion with evidence of his knowledge of her prior sexual activity or knowledge. He was unable to present records from MCDS which tend to show the nature and extent of her knowledge about sex. (Vol. 13, pp. 211, 247-261). Such evidence would have negated the state's case on the issue of knowledge of a mental deficiency or disease. The only evidence the jury heard from the State's witnesses was that the file of R.C. contained references to her mental retardation, yet all of the records were available to Mr. Hardaway. (Vol. 12, p. 177). Without the evidentiary support, the statement or opinion of the defendant that he had no reason to question whether or not R.C. had the ability to consent to sex appears to be nothing more than self-serving comment not to be given much weight or credibility.

When the state's witness, Denise Bobadilla testified regarding the contents of the file maintained on R.C. it is the contention of the defendant that the door was opened as to her prior sexual conduct. (Vol. 12, pp. 176-177). The case of *State v. Faulkner,* 220 Kan. 153, 551 P.2d 1247 (1976) stands for the proposition that once a witness opens the

door to a forbidden area, a party is free to explore the area fully on cross-examination even though it was previously a protected area. In *Faulkner* the court dealt with the situation where a defendant opens the door to his prior criminal history during cross-examination Faulkner testified on cross-examination that he "don't have drugs in his possession." *Id.* at p. 159. The prosecutor was allowed to introduce and examine about [11] prior instances in which he had possessed drugs. Once opened the prosecution was free to fully explore the once prohibited area.

In this case, when Mrs. Bobadilla testifies as to the contents of the file, including the fact that the entire file of R.C. was available to Hardaway, and the State sponsors the notion that the defendant knew the contents of the entire file, the defense should have had an opportunity to fully cross-examine on those files, including references to the sexual knowledge and experience of the alleged victim. *K.S.A. 21-3525(c)* provides:

> "In any prosecution for a crime designated in subsection (a), the prosecuting attorney may introduce evidence concerning any previous sexual conduct of the complaining witness, and the complaining witness may testify as to any such previous sexual conduct. If such evidence or testimony is introduced, the defendant may cross-examine the witness who gives such testimony and offer relevant evidence limited specifically to the rebuttal of such evidence or testimony introduced by the prosecutor or given by the complaining witness."

It is contemplated that if the victim or the prosecution presents evidence of prior sexual conduct the defendant may freely rebut with relevant information. The

statements of the state's witnesses who worked with MCDS as to the contents of R.C.'s file constitutes an introduction of prior sexual conduct. It should also be noted that the testimony regarding the lack of sexual knowledge appears to raise the possibility of impeachment under the statute. Where great care is taken to leave the jury with a pristine image of the victim, the defendant should have an opportunity to rebut.

[12] THE COURT'S RULING EXCLUDING PRIOR SEXUAL CONDUCT DENIES THE OPPORTUNITY TO PROPERLY CROSS EXAMINE THE STATE'S WITNESSES.

The court's ruling denying the introduction of prior sexual conduct also undercuts the opinion of the defense expert who testified that the victim could consent to sex. (Vol. 13, p. 122). During the interview with Dr. Schulman, R.C. admitted to several sexual contacts and that she had been sexually active. (See Appendix A). By restricting his testimony on the basis for his expert opinion, Dr. Schulman, loses weight and credibility with the jury. The statements to Dr. Schulman could have been used to cross-examine the victim and leave the proper impression with the jury, this woman had sexual knowledge and was putting it to use.

Cross-examination of the victim was limited by the court's ruling. R.C. was portrayed to the jury as a naive woman without knowledge about sex. Her interviews with the experts differed. The State's expert, Dr. Pearce, testified that R.C. had a limited knowledge about sex and that this was a basis for her opinion that R.C. could not give consent to sex. If able to confront Dr. Pearce with

specific instances of sexual conduct on the part of R.C., the testimony and credibility of Dr. Pearce would have had less of an impact and the jury could have easily adopted the opinion of the defense expert. Numerous witnesses testified that R.C. had a reputation for exaggeration and for being less than truthful. (Vol. 12, p. 122; Vol 14, pp. 111, 202) She made inconsistent statements regarding her sexual experiences to the experts which needed to be [13] exposed to the jury during cross-examination, but were not due to the trial court's ruling on prior sexual conduct.

"The statute does not preclude the admission of evidence that another person may have been guilty of the alleged sexual abuse or relevant evidence that impeaches the credibility and testimony of a witness. *State v. Arrington*, 251 Kan. 747, 750, 840 P.2d 477 (1992). In *Arrington* the trial court was asked to decide on the admission of an entire police statement wherein the victim in a portion of the statement indicated that the mother may have sexually abused the children. The issue was not properly preserved for appellate review and the court did not reach a conclusion. The case seems to indicate the statement could have come in to impeach the witness or show somebody else committed the crime.

In this case some headway was made during the cross-examination of the state's expert and her opinion. The victim was interviewed and presented with little knowledge of sex. (Vol. 13, p. 72). An attack on the expert's opinion and the weight and credibility the jury should give the opinion was once again thwarted by the court's ruling. Clearly the defense expert had more relevant information when forming his opinion, but this was

not known by the jury and could not be used in comparing the two reports. The jury was confused on the issue of valid consent and asked for help during the deliberations. (Vol. 1, p.115). This seems to indicate with additional support the jury could have accepted Dr. Schulman's opinion that R.C. could give a valid consent. (Vol. 13, p. 192).

[14] The rape shield statute is designed to preserve the privacy of the victim and to encourage persons to report crimes and to testify. The Supreme Court in *State v. Arrington*, 251 Kan. 747, Syl. #1, 840 P.2d 477 (1992), stated:

> "K.S.A. 21-3525, commonly referred to as the rape shield statute, has two principal purposes: (1) to protect a victim of rape, or other sexual crimes specified in the statute, from the trauma and unnecessary embarrassment resulting from irrelevant evidence of a victim's prior sexual activity, and (2) to encourage victims to report and prosecute sexual crimes."

The victim is not to be put on trial, but where consent and knowledge are relevant as they are here, admission should be favored. The trial court in the letter ruling points out that admission of any evidence of prior sexual conduct is obviously potentially damaging to the State's case. The decision that the probative value was less than the prejudicial effect is clearly erroneous. It is true that had the jury heard the evidence the state's chances for conviction would have been diminished, but such is oftentimes the case when all relevant facts are heard. The prejudice to the defendant should have been considered not that of the state. In this case it is the victim's ability to

consent and the defendant's knowledge thereof which dictates criminal liability. The sexual activity necessary to establish penetration was admitted from the witness stand by the defendant. Nothing could be more probative on the issue of what the defendant knew about the victim's ability to consent than the fact that she was engaging in sexual activity with others and this fact was known to defendant and to others charged with providing her assistance. The [15] defendant, while employed by MCDS, was asked by the victim about matters relating to sex. (Vol 14, p. 62). He could not under the court's ruling go into details which would have demonstrated her sexual knowledge and ability to consent.

II. THE TRIAL COURT ERRED BY QUALIFYING THE STATE'S DOCTOR AS AN EXPERT AND IN ALLOWING HER TO GIVE AN OPINION ON CONSENT.

At trial the State called Dr. Kathy Pearce to testify. Dr. Pearce at the State's request examined the victim. She has PhD in psychology. She testified that during her training and experience she had been call on one occasion to testify as an expert and that was in the area of testing. (Vol. 13, p. 66). Dr. Pearce had never been called upon to give an opinion on a person's cognitive reasoning necessary to form consent to giving sex. (Vol. 13, p. 67). The defense objected to her qualifications at that point and the court overruled the objection. (Vol. 13, p. 68).

Dr. Pearce continued to testify concerning standards obtained from an agency in Kansas City, Missouri. Over objection of the defendant, Dr. Pearce applied this article

to her interview and gave the opinion R.C. could not consent to sex. (Vol. 13, p. 78). In *Bressman* the court revisits the standards for giving expert opinion. Citing *Lollis v. Superior Sales Co.*, 224 Kan. 251, 580 P.2d 423 (1978), the court states opinion testimony of experts on the ultimate issue or issues is not admissible without limitation. Such testimony is admissible only insofar as the opinion will aid

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No. 97-80421-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff/Appellee

vs.

TYRON LATWAIN HARDAWAY
Defendant/Appellant

PETITION TO SUPREME COURT FOR REVIEW

Appeal from the District Court of
McPherson County, Kansas
Honorable Richard B. Walker, District Court Judge
District Court Case 96 CR 4903

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* * *

[4] 10, p. 5; Vol 5, p. 1). A motion under K.S.A. 21-3525, the "Rape Shield Statute", was filed by the defendant

seeking to introduce evidence of the victim's prior sexual conduct. (Vol. 1, p. 63) After the hearing on the motion wherein the report of Dr. Schulman was received and reviewed by the court, the motion seeking to introduce at trial evidence of the victim's prior sexual conduct was denied with the court issuing the ruling in a letter dated June 10, 1997. (Vol. 1, p. 23). The case proceeded to trial.

ARGUMENT AND AUTHORITY

Did the trial court err in refusing to allow evidence of prior sexual conduct?

The denial of defendant's motion under the Rape Shield Statute prevented the defendant from receiving a fair trial. Mr. Hardaway was accused of rape wherein the victim, due to mental disease, was unable to give consent to sexual conduct. Prior sexual conduct on the part of the victim was not disputed. The Court of Appeals felt it would be admissible if the prior conduct and the act giving rise to the charge herein were similar in nature. *State v. Lavery*, 19 Kan. App. 2d 673, 877 P.2d 443, *rev. denied* 253 Kan. 862. (1993). The standard set forth in *Lavery* requires a showing of abuse of discretion. Here the abuse is clear. The defendant must be given a fair trial. To do this, it is necessary for the defendant to put forth evidence of prior sexual conduct to (1) impeach the opinion of the state's expert, (2) to negate the idea the victim could not give consent, and (3) to impeach the victim's truth or veracity due to her prior inconsistent statements about her sexual history made [5] to the experts in this case.

The statute is designed to protect a victim from unnecessary harassment on the stand and to foster the

bringing forth complaints to the police. The jury must decide the credibility of witnesses from the testimony and their in court observations. Here the victim gave testimony and left an impression that was inconsistent with her interview with Dr. Schulman. Either she lied to Dr. Schulman or she lied to Dr. Pearce, the state's expert. In either event the jury should have known the inconstancy and it was abuse to deny the admission. The statute here was used to bolster the state's case and prevented a fair trial by excluding evidence damaging to the state's case.

Did the trial court err by qualifying the state's doctor as an expert and in allowing her to give an opinion on consent?

It is up to the trial court to determine an expert's qualifications and the admissibility of the testimony. *State v. McClain,* 216 Kan. 602, 533 P.2d 1277 (1975). The trial court's determination will not be reversed absent a showing of an abuse of discretion, *State v. Willis,* 256 Kan. 837, 888 P.2d 839 (1995).

Dr. Pearce was qualified to administer IQ tests and to interpret those for the jury, but she had no qualification to draw conclusions from these tests that the victim could give consent.

The trial court abused its discretion by allowing the opinion from the state's expert. Dr. Pearce testified she did not have training and relied on standards used in Missouri in forming her opinion. Dr. Pearce gave standardized tests to determine IQ and

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